IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 21 OF 2019

BETWEEN

PETER MWANGI WANJIKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Kiambu (**J. Kamau, J**) dated 26th *June, 2018* ***in H.C.CR.A. NO. 133 OF 2017)***

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JUDGMENT OF THE COURT

1. This is a second appeal filed by the appellant in which he challenges the judgment of the High Court (**Kamau, J**) upholding his conviction and sentence by the Chief Magistrate's Court at Kiambu for the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge alleged that while in the company of another, he robbed **Solomon Mwangi Wairimu (Solomon)** of a mobile phone make Alcatel valued at Kshs. 2,000 and cash Kshs. 1,800, and that at the time of the robbery he stabbed the said Solomon.

2. In his first appeal the appellant had faulted the judgment of the trial magistrate on the grounds that the charge sheet was fatally defective; that he was convicted on the evidence of a single witness; that the evidence of identification did not meet the necessary threshold; that the Investigation officer and doctor did not testify despite them being crucial witnesses; and that the prosecution failed to prove its case beyond reasonable doubt.

3. Upon hearing the appeal, the learned Judge rejected the ground that the charge sheet was defective, noting that there was evidence that the appellant was in the company of another person, that he was armed with a knife, and that these facts were sufficient to prove the ingredients of the offence of robbery with violence. Besides, the appellant did not demonstrate what prejudice, if any, that he suffered due to the alleged defect in the charge sheet. The learned Judge was satisfied that the prosecution had proved its case, as Solomon who was the only witness who testified, was able to recognize the appellant as his attacker.

4. As regards the appellant's sentence, the learned Judge being guided by the case of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**; remitted the matter to the trial court for re- sentencing.

[5] During the hearing of the appeal, learned Counsel Mr. Oira appeared for the appellant. Mr. Oira relied on the supplementary grounds of appeal which raised nine grounds. The grounds can be compressed into 5 issues as follows: -

i. That there was no proper identification parade carried out.

ii. That the evidence convicting the appellant was inconclusive, tainted and not sufficient to prove the charge against the appellant beyond any reasonable doubt

iii. That the High Court failed to properly re-evaluate and re-analyze the evidence

iv. That the appellant was convicted by the evidence of a single witness which was not free of errors

v. That the Court did not take the mitigating factors into account in sentencing the appellant.

6. In support of the appeal Mr. Oira submitted orally, that the evidence that was adduced before the trial court did not meet the threshold required as it was the evidence of a single witness which was not corroborated; that the evidence of the appellant that he overpowered two armed persons was unbelievable; that although the appellant alleged that he made a report to the police no officer was called to testify; and finally the appellant is alleged to have been arrested through the assistance of some boda-boda operators but none was called to testify. Relying on **Maitanyi vs Republic** and **Anjononi vs Republi**c, Mr. Oira urged the Court to allow the appeal.

7. Mr. O'mirera Senior Assistant Director of Public Prosecutions argued the appeal on behalf of the State. In highlighting the written submissions that he had duly filed, Mr. O'mirera argued that the two lower courts made concurrent findings accepting the evidence of Solomon on the identification of the appellant, and were both satisfied that the witness knew the appellant by name. Mr. O'mirera maintained that the conduct of Solomon was consistent with that of a person who knew the assailant. As regards the charge, Mr. O'mirera maintained that there was at least one ingredient upon which the charge could be upheld, and this was the fact that the appellant was in the company of another person.

8. As regards the issue of sentence, Mr. O'mirera argued that the matter is prematurely before the Court because the learned Judge of the High Court did not make any determination on the issue of sentence but remitted the matter to the trial court for re-sentencing. Mr. O'mirera cited the Supreme Court decision in **Charles Maina Gitonga vs Republic, Petition No. 11 of 2017** in which the Supreme Court held, that the Court of Appeal had no jurisdiction to hear a matter that was not canvassed in the High Court. Mr. O'mirera therefore urged the Court to dismiss the appeal in its entirety.

9. Under Section 361(1) of the Criminal Procedure Code, this Court is mandated to consider a second appeal on matters of law only. In **Karani vs. R [2010] 1 KLR 73** this Court described its mandate as follows: -

> **"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

10. Also, in **David Njoroge v Republic, [2011] eKLR**, this Court 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 the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213".**

11. Having carefully considered the record of appeal, the submissions before us and the authorities cited, we discern three broad issues of law that arise in this appeal. These are: whether the learned Judge properly directed herself and properly considered the evidence of identification; whether the learned Judge properly reconsidered and re-evaluated the evidence which was adduced before the trial court, and if so whether the evidence adduced is sufficient to sustain the appellant's conviction; and finally, whether it is open to this Court to reconsider and review the sentence that was imposed on the appellant.

12. The first issue that we wish to address is the issue of identification. The appellant was convicted on the evidence of **Solomon,** who was the only substantive witness. The second witness **Dr. Joseph Maundu**, who was to produce the P3 form was stood down after the appellant insisted on the P3 form being produced by **Dr. Shako** who had examined Solomon and filled the form. Dr. Shako was unable to attend court to produce the P3 form as he was out of the country. This left only the evidence of Solomon, a boda boda rider, who maintained that he was attacked and robbed by the appellant and another, at around 3.00 am. Solomon claimed that he was able to identify the appellant because the area where he was attacked was well lit with electricity and the bulbs were bright. He also claimed that the appellant was a person well known to him as they used to play pool game together.

13. **Section 143** of the **Evidence Act** provides that a court can convict on the evidence of a single witness. The said section reads, **"No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact."** Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in **Maitanyi vs Republic** [1986] KLR 198:

> **"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.**
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> **2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.**
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> **3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.**
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> **4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."**

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In **Maitanyi v Republic** (supra), the Court emphasized that:

> **"What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ….**
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> **There is a second line of enquiry 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."**

15. It is evident from the judgment of the High Court that the learned judge properly directed herself on her duty as a first appellate court by referring to **Odhiambo v Republic Cr App No 280 of 2004.** The issue is whether the first appellate court discharged its duty of reconsidering and re-evaluating the evidence. As was stated in **Okeno vs R** [1972] EA 32:

> **"…it is not the function of the 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 can 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 witness. See Peter vs. Sunday Post [1958] EA 424."**

16. The learned Judge of the first appellate court rendered herself as follows:

> **"28. It was correct as the Appellant stated that this was a case of a single witness where a court must caution itself before accepting such evidence hook, line and sinker. This court noted that the Learned Trial Magistrate cautioned himself of the dangers of relying on the evidence of a single witness and stated as much in his Judgment.**
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> **29. PW 1 was emphatic that he recognised the Appellant. He stated that the area the attack took place was well lit. The Appellant did not deny that he knew PW 1 and did not give an alibi of where he was on 27*th January 2015 at 3.00 am. The lighting condition was adequate for PW 1 to have seen that the Appellant was in the company of another person who was armed with a gun he lost his tooth.***
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> **Notably, the Learned Trial Magistrate noted PW 1's missing tooth during the trial. The burden lay upon him to adduce evidence to remove himself from the scene of the crime on the material date.**
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> **30. The fact that PW 1 did not give his attacker's name when he recorded the First Report was not fatal to the Prosecution's case. Indeed, the fact that a witness does not know his attacker's name would not render his evidence worthless. It was evident that PW 1 recognised the Appellant as the person who used to sell miraa at Njathaini. He was so certain who the Appellant was that he found out from the Appellant's landlord where he stayed before he mobilised boda boda operators to go to the**
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> **Appellant's house and arrested him.**
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> **31. Accordingly, having analysed the evidence that was adduced in the Trial Court and the oral and written submissions by the respective parties herein, this court came to the firm conclusion that the Learned Trial Magistrate arrived at a correct finding when he found that the Prosecution proved its case."**

17. Despite the correct appreciation of the law, the learned Judge did not properly test the impression of Solomon at the time of the incident. Although Solomon insisted that the place was well-lit with electric light, he did respond in cross-examination that the lights were coming from the plot near where he was attacked. No inquiry was carried out to ascertain how far that plot was from where the attack took place, and at what point the lights were. It is not even clear whether the lights were inside the plot, or whether they were security lights within the plot or whether they were street lights.

18. Secondly, much as Solomon maintained that he did identify the appellant during the attack, the first report and the statement made by the witness to the police, which were both put to the witness during cross-examination, did not reveal any description of any of the two people who attacked Solomon, nor was it indicated in the statement that Solomon knew or identified any of his assailant by name. The possibility of Solomon not having been completely sure of the identity of his assailants was not ruled out. Indeed, as was stated in **Maitanyi vs Republic** (supra), the incident having taken place at night in circumstances that were stressful, the possibility of a mistaken albeit honest identification cannot be ruled out.

20. Thirdly, Solomon testified that he was carrying a passenger at the time of the attack. However, this passenger who no doubt witnessed what happened was neither identified nor was she called to testify. The police officer to whom Solomon made his first report was also not called to testify, nor were any of the boda boda riders who are said to have helped in arresting the appellant. These were all crucial witnesses, and yet no reason was given for the failure to call them. We appreciate that the prosecution had the discretion to decide who to call as witnesses. However, as was held in **Bukenya & Others vs Uganda [1972] EA 549**:

> **"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

ii. The Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

21.In addition, the extract of the judgment of the learned Judge, reproduced at paragraph 16 of this judgment, reveals that the learned Judge misdirected herself by shifting the burden of proof onto to the appellant, contending that the appellant did not give an alibi of where he was on the material date, "**and that the burden lay upon him to adduce evidence to remove himself from the scene of the crime on the material date**". The appellant had no responsibility to give any alibi or prove anything. The burden of proof remained upon the prosecution to prove the case against the appellant and the learned Judge erred in shifting the same to the appellant.

22. We believe we have said enough to demonstrate that the learned Judge failed to properly analyse and evaluate the evidence, and that had she done so, she would have found that the evidence of identification by Solomon a single witness was not safe to rely upon. In addition, the evidence adduced by the prosecution was not sufficient to sustain the appellant's conviction, and the learned Judge erred in shifting the burden of proof to the appellant. Consequently, the appeal against conviction must succeed.

23. As regards the sentence, the High Court remitted the matter to the trial court for re-sentencing. This was within the powers of the court and no legal issues arises therefrom to warrant our interference. However, as the sentence was predicated on the appellant's conviction, in view of our finding on the issue of conviction, the sentence cannot stand.

24. Accordingly, we allow the appeal against both conviction and sentence, quash the appellant's conviction and set aside the death sentence that was imposed upon him. The appellant shall forthwith be released unless otherwise lawfully held.

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

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR