IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 85 OF 2016

BETWEEN

SAMMY MUTHANGYA KATUTA.....1ST APPELLANT

KITONGA WAMBUA MWALILI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos

(Jaden & Ngugi, JJ) dated 30th October 2013

in

H.C.Cr.A. Nos 51 & 52 of 2012)

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JUDGMENT OF THE COURT

BACKGROUND

1. The appellants, **Sammy Muthangya Katuta** (the 1st appellant) and **Kitonga Wambua Mwalili** (the 2nd appellant) were charged together with their co-accused, **Kiema Wambua**, with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The brief particulars of the offence were that on 17th May, 2010, while armed with an assortment of dangerous weapons, they robbed **Stephen Nzioki Nzolo** and at the time of such robbery, used actual violence on him.

2. In brief, the facts culminating in this appeal are that on 17th May, 2010 **Stephen Nzioki Nzolo (PW1**), was on duty at the Majengo Karolina Bar where he worked as a watchman. It was his evidence that at about 2.00am he heard a bang and proceeded to investigate the cause whereupon he was accosted by a gang of people, wearing paper bags on their heads armed with *pangas, rungus* and bows and arrows. The assailants attacked him, injured his right shoulder and stole his mobile phone, a Nokia 6020, cash of Kshs 450.00, keys and a whistle. It was his further testimony that about an hour after the attack, police officers arrived, set him free and took him to Kitui District Hospital where he was treated and discharged.

3. **PC Omondi Tula (PW3)** was the investigating officer who testified that on the material night at about 2.30pm he was informed by **PC Ndirangu** that a robbery was taking place at a bar in the Majengo area. It was his further testimony that **APC Salat (PW6)** and **Corporal Timothy Muya (PW5)** proceeded to Karolina Bar where they found a robbery in progress. When the robbers heard the police arrive, they attempted to escape. The 1st appellant who was armed with a bow and arrow ran towards the police causing **APC Salat (PW6)** to shoot him, injuring him on the leg.

4. **PW5** recognized the 2nd appellant and called out to him by name to surrender, but he and other assailants ran away. The police officers arrested the 1st appellant and took him and **PW1** to Kitui District Hospital where they were both treated by **Joseph Katothya (PW4**), a clinical officer at the Hospital. **PW4** produced the P3 form in respect of the complainant which indicated that the complainant had sustained injuries on the forehead, chest, right shoulder and right thigh and that the degree of injury was 'harm'.

5. Upon interrogation, the 1st appellant revealed to the police that his accomplices in the robbery were the 2nd appellant and **Kiema Wambua** who were arrested on the basis of this evidence. The 1st and 2nd appellants as well as **Kiema Wambua** were put on their defence and denied the charge of robbery with violence.

6. In his defence, the 1st appellant gave sworn testimony that on the material he was on his way to the bus stop to board a vehicle that was scheduled to depart at 3.30am. That while on his way, someone ordered him to stop but he did not heed the order as the person calling him did not identify himself and also because the particular area was unsafe. It was his further evidence that he was shot on the leg and subsequently taken to Kitui District Hospital where he was treated and later charged with the offence of robbery with violence. On his part, the 2nd appellant stated that he worked as a tout at the bus stage but he was arrested by a police officer who had a grudge against him.

7. The trial court held that the appellants and their co-accused **(Kiema Wambua)** were at the scene and committed the offence as charged and sentenced them to suffer death. The appellants and their co-accused filed a first appeal to the High Court challenging their conviction and sentence. The High Court upheld the conviction and sentence meted on the 1st and 2nd appellants and allowed the appeal by **Kiema Wambua**, quashed his conviction and set aside the sentence imposed on him by the trial court.

8. Undeterred, the appellants filed this second appeal raising various grounds of appeal that: the identification of the appellants was improper; the evidence against the appellants was circumstantial and insufficient to sustain the convictions; the charge against the appellants was not proved beyond any reasonable doubt; and that there were mis-directions by the two courts below that prejudiced the appellants.

SUBMISSIONS BY COUNSEL

9. These grounds and the supplementary grounds of appeal, were submitted upon on behalf of the appellants by **Mr**. **Ondieki**, learned counsel. The first issue raised by **Mr. Ondieki** was on the identification of the appellants. Counsel submitted that the recognition of the 1st appellant was improper. **Mr. Ondieki** drew our attention to the evidence of the complainant who stated that he did not identify any of the assailants. Counsel submitted that the evidence of **Corporal Muya (PW5)** that he recognized the 2nd appellant was unsafe as in the circumstances prevailing, it was possible to make mistakes. Counsel urged us to allow the appeal on this ground.

10. **Mr. Ondieki** further submitted that the first appellate court failed to re-evaluate the entire evidence and reach a proper conclusion. Counsel submitted that had the trial court done so, it would have noted that **APC Salat (PW6)** testified that the 1st appellant was shot from the front while the 1st appellant testified that he was shot from the back. Counsel submitted that on the basis of this contradiction, the doubt should have been resolved in favour of the 1st appellant.

11. It was counsel's further submission that the trial court misdirected itself by: taking issue with the fact that the appellants did not call any witnesses in support of the defence case; failing to consider the defences proffered by the appellants; and shifting the burden of proof from the prosecution to the defence.

12. **Mr**. **Ondieki's** final submissions were that there were a myriad of constitutional violations against the appellants in the course of their trial *inter alia* that the 1st appellant was tortured and denied medical attention for the injury he sustained when he was shot; and that the appellants were denied witness statements and those that were provided had errors. Counsel submitted that these were violations of the right to a fair trial under **Articles 25** and **Article 50** of the **Constitution**, which render the appellants' convictions unsafe.

13. The respondents opposed the appeal through Senior Principal Prosecution Counsel, **Ms. Wang'ele** who denied that any of the appellants' constitutional rights were violated. Counsel referred to the record and submitted that the 1st appellant was taken for medical treatment prior to commencement of the trial. Counsel further submitted that the record was clear that the appellants' request for witness statements was acceded to and that any errors that may have occurred in the proceedings were not Constitutional violations that would have rendered the appellants' trial a nullity.

14. **Ms. Wang'ele** argued that the prosecution proved its case against the appellants for the offence of robbery with violence to the required standard; that all the ingredients for the offence of robbery with violence were present in the circumstances of this case; and that the identification of the 1st appellant was not in question as he was arrested at the *locus in quo*. As regards identification of the 2nd appellant, counsel submitted that it was a case of recognition, since he was seen and recognized by **PC Muya (PW5)** who called him by name. Counsel submitted that there was therefore sufficient evidence to place both appellants at the *locus in quo*.

15. **Ms. Wang'ele** further stated that there was no indication that the trial court and the first appellate court had drawn an adverse inference from the appellants' failure to call witnesses. On the basis of this, **Ms. Wang'ele** urged that the prosecution had proved its case to the required standard and there was therefore no basis for this Court to interfere with the conviction and sentence. Counsel urged us to dismiss the appeal.

DETERMINATION

16. This being a second appeal, our mandate as a second appellate court is circumscribed under **Section 361**(**1**)(**a**) of the **Criminal Procedure Code** to consider only matters of law. In ***Martin Oduor Lango & 2 others v Republic [2014] eKLR*** this Court stated as follows:

> ***"… [W]e must recall that this is a second appeal and it must therefore lie on issues of law only-see Section 361, Criminal Procedure Code. The concurrent findings of fact made by the two courts below shall be respected by this Court and shall not be disturbed unless they were not based on any evidence at all or were based on a perversion of the evidence on record or unless it can be shown demonstrably that there was an error in principle in making such findings."***

17. We have considered the grounds of appeal, the rival submissions, the authorities cited and the law. This appeal is pegged on three issues of law: whether the appellants were placed at the scene of the crime through proper identification; whether the 1st appellate court properly re-

evaluated the evidence; and whether the appellants' constitutional rights were violated.

18. On the question whether the 1st appellant was placed at the scene of the crime through proper identification, it was the evidence of **APC Salat (PW6**) that the 1st appellant was armed with a bow and arrow and advanced towards him in defiance of orders for him to stop prompting **PW6** to shoot him. **PW6** testified that the security light aided him in seeing the 1st appellant who was attempting to run away from the scene of the crime. **PW5** also testified that the lights were on inside and outside the bar and that the light was "enough" for him to see the 1st appellant attempt to run away before being shot. **PW3,** the Investigating Officer also testified that he saw the 1st appellant going towards **PW6** before **PW6** shot him. It was the evidence of **PW3** that there were electricity lights in the bar which enabled him to see the 1st appellant. The evidence of **PW3, PW5** and **PW6** place the 1st appellant in the *locus in quo.*

19. It was the contention of counsel for the appellants that the 2nd appellant was improperly placed at the scene of the crime as the circumstances were unfavourable for proper recognition. In ***Paul Etole & another v Republic [2001] eKLR*** the Court restated the need for caution while receiving all forms of identification evidence as follows:

> ***"[identification] evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."*** [Emphasis supplied].

20. In the instant appeal, the evidence against the 2nd appellant was that of recognition by **PC Muya (PW5)**. This Court in ***John Muriithi Nyagah v Republic [2014] eKLR*** stated as follows:

> ***"… it is acceptable in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger."***

21. We have considered these principles of law and applied them to the evidence tendered before the trial court and the submissions of counsel before us. The evidence adduced showed that there was sufficient illumination from a security light which enabled **PC Muya (PW5)** to see and identify the 2nd appellant and call out to him **"Mwalili stop! I know you."** It was the further evidence of **PC Muya (PW5)** that there was sufficient light and that he saw the 2nd appellant from a distance of about five (5) metres. We therefore find that the two courts below did not err when they found that **PW5's** evidence was that of recognition from close proximity. We are satisfied that the 2nd appellant was properly recognised by **PC Muya (PW5)** which evidence offered material corroboration to the accomplice evidence adduced by the 1st appellant that the 2nd appellant was one of the robbers who violently robbed **PW1**.

22. The next issue that we must consider arises from the appellants' complaint that the High Court failed in its duty to re-evaluate the evidence. A failure of the first appellate court to perform its duty as stated amounts to a matter of law that is for consideration by this Court. See: ***Alexander Ongasia & 8 others v Republic [1993] eKLR Criminal Appeal 88 of 1992***. It is also notable that:

> ***"there is no set format on how such an exercise should be undertaken. Every court will have its own way of doing so. What is not in doubt is that the re-evaluation must be self-evident in the judgment"*** See ***Jeremiah Nyaga & 2 others v Republic [2016] eKLR Criminal Appeal 35 of 2015***."

23. Counsel for the appellants contended that the failure by the first appellate court led to various mis-directions, the first of which was to fail to consider the evidence that the appellant was shot from the back, and not from the front as was alleged by the prosecution. The evidence adduced by **PC Muya (PW5)** and **APC Salat (PW6)** is that the 1st appellant was armed with bows and arrows and advanced as if to shoot **APC Salat (PW6)**. **APC Salat** testified that he ordered the 1st appellant to surrender, but the 1st appellant failed to do so, choosing instead to run away, which prompted **APC Salat** to shoot him on the leg. It was the evidence of **APC Salat (PW6)** that he had clearly seen the 1st appellant as there was sufficient light. The trial court considered this evidence and found that the evidence adduced by **APC Salat (PW6)** had been corroborated by **PW3** and **PW5** and that the inescapable conclusion was that the 1st appellant was shot while at the scene of the crime.

24. The second misdirection alleged by counsel for the appellants is that the two courts below failed to objectively consider the appellants' defences and thus shifted the burden of proof to the appellants. As we have stated, both the trial court and the first appellate court accepted the evidence that the 1st appellant was seen and shot while at the scene of the crime and not on the road as he claimed, while the 2nd appellant was positively recognized by **PC Muya (PW5)**. A consideration of the judgments of the trial court and the 1st appellate court reveals that the two courts below did in fact consider the defences advanced by the appellants and found that they could not dislodge the strong prosecution evidence against them. This ground of appeal must therefore fail.

25. Counsel for the appellants contended that the two courts below misdirected themselves in finding against the appellants for failure to call any witnesses. From the record, we observe that these statements were included in the judgments of the two lower courts, but it is clear to us that no inferences were made by the two courts below based on this, and that they were mere observations made when the lower courts were summarizing the evidence. Having considered the arguments by the appellants alongside the impugned judgments of the two courts below, we have no hesitation in finding that there were no mis-directions by the two courts below that prejudiced the appellants.

26. The final issue of law raised in this appeal is that the appellants were not afforded a fair trial as provided in the Constitution. First, it was alleged that the appellants were not provided with witness statements and that those that were eventually provided were full of errors. We have considered the sections of the record of appeal referred to us by appellants' counsel and note that the appellants had indicated that they

did not have witness statements, but a court order was issued directing that they be supplied with the statementsupon payment of the required fees. Subsequently, on 29th September 2010, the appellants and their co-accused indicated that they were ready to proceed with trial.

27. The allegation that the appellants were unable to participate in the trial because they could not understand English does not hold, since the record bears out the fact that there was translation from English to Kamba languages for each witness who testified. The proceedings in the 1st appellate court were conducted in English but there was translation in Kiswahili. The appellants both had written submissions, and they also made a few statements in support of these submissions. This ground of appeal therefore fails.

28. Further, the allegation that the 1st appellant was not taken for treatment is unfounded. It is clear from the record that when the appellant appeared before the trial court on 27th May 2010, he informed the court that he had been taken for treatment but not given any medication. The trial Court directed that he be taken back to Kitui Police Station for treatment. On 28th May 2010, the trial court further directed that the OCS Kitui to ensure that the 1st appellant was given treatment, and on 31st May 2010, the 1st appellant confirmed to the trial court that he was indeed taken to the hospital, after which the trial commenced.

29. The upshot is that we are satisfied that the two courts below properly analyzed and re-analyzed the evidence and arrived at the conclusion that the appellants were guilty as charged. Accordingly, we find no merit in this appeal. The appellants' appeal against conviction and sentence is hereby dismissed. It is so ordered.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR