IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 39 OF 2008

BETWEEN

DAVID KAMAU WANJIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (Ojwang & Dulu, JJ.)

dated 15th April, 2008 in H.C.CR.A 306 of 2005)

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JUDGMENT OF THE COURT

In the early morning of 20th December, 2003 at [Particulars Withheld] Village in Thika District, a gang of seven robbers who were armed with knives, machetes and sticks accosted and robbed DWK (PW1), her husband and a friend, AWM (PW2) while walking home at 2.00am. In the course of the robbery, PW1's husband escaped leaving the two ladies at the mercy of the robbers. After stealing Kshs.140 and Kshs. 80 respectively from the ladies, five members of the gang took PW2 to a dark part off the road and removed her clothes in an attempt to rape her. As the five were so preoccupied, PW1 got an opportunity and escaped into a nearby residential plot from where she raised alarm. As police officers who were on patrol in the area responded, all the robbers fled. That very night, the police were able to arrest two suspects, David Kamau Wanjiru (the appellant) and (Julius Ngugi Kangethe), his co-accused, who could not give an account of themselves at that wee hour. To give a chance to the victims to try and see if the two suspects were part of the gang that had attacked them, a police identification parade was mounted 10 days later, at which the appellant and his co-accused were picked out by PW2. On her part PW1 was categorical that she could not identify any of the robbers.

The appellant and Julius Ngugi Kangethe were subsequently charged with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and one charge of attempted rape contrary to **section 141** of the Penal Code. While their trial was pending Julius Ngugi Kangethe died and the charges against him were terminated.

In his defence, the appellant denied the charges and explained that, while walking home from work, he was arrested by police officers who already had arrested several other persons; that he was not told the reason for his arrest; and that he was later charged jointly with a person unknown to him.

At the conclusion of the trial, the court acquitted the appellant for want of evidence in support of the charge of attempted rape but found him guilty of the two counts of robbery with violence and accordingly sentenced him to death.

The High Court *(Ojwang –(as he then was) & Dulu, JJ.)* found as a matter of fact, that since PW1 had no opportunity to identify any one of the robbers, the appellant's conviction was hinged only on the evidence of PW2, based on her testimony that with the aid of electrical lighting from the neighbouring buildings she was able to recall the facial and physical features of the appellant. The learned Judges were persuaded too, from that evidence that the appellant's identification was reliable and safe. Consequently, they upheld the conviction and sentence of the appellant upon dismissing his appeal.

The appellant now challenges before this Court that conviction and sentence relying on nine (9) grounds of appeal, essentially faulting the finding on identification.

Mr. Ratemo, learned counsel for the appellant reminded us that although the appellant was acquitted on the charge of attempted rape purely

for the reason that there was no proper identification, it was strange that he could be convicted on the counts of robbery with violence on the strength of the very evidence; that without corroboration by PW1's husband, PW2's evidence lacked credibility thereby raising doubt as to the identity of the attackers; that the first appellate court did not note the failure of the trial court to warn itself of the danger of relying on the evidence of a single witness; and that the identification parade was not properly conducted.

On sentence, counsel urged us to reconsider the appellant's mitigating factors in accordance with the Supreme Court decision in **Francis Muruatetu & Others vs. Republic**, Petition No 15 of 2015 and to impose an appropriate sentence.

Ms. Matiru, learned counsel for the respondent opposed the appeal. She maintained that PW2 clearly and properly identified the appellant and that she was also able to pick him out of the other members of the parade; that it was pointless to call the husband of PW1 because he ran away at the point of robbery; that the appellant failed to explain his presence at the scene; and that the appellant was in the company of others armed with knives, thereby committing an offence of robbery with violence under **section 269(2)** of the Penal Code. Counsel left it for us to exercise our discretion on the question of sentence.

We reiterate what the Court has stated time and again that on a second appeal, the Court will not, as a general rule, interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was stressed in **Chemagong vs. Republic** [1984] KLR 213 at page 219, where the Court expressed the view that:-

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."**

Upon examination of the record, the grounds of appeal as well as the rival arguments by parties, in our estimation, the only issue before the courts below and indeed before us, is that of identification of the appellant.

The High Court, being the first appellate court, was required to evaluate the evidence that was before it in order to arrive at its own independent conclusion on the question of identification of the appellant as demanded in **Okeno vs. Republic** [1972] EA 32. Though alive to the fact that the determination of the issue of identification of the appellant at the scene of the robbery was paramount and secondly, that the evidence of identification was that of a single witness which comes with the dangers of mistaken identity, the learned judges failed to re-evaluate that evidence.

For instance, the number of assailants who had engaged PW2 was given as 5. The time was past 2am. At one point, PW2 talked of light from neighbouring buildings. Next, she explained that the robbers quickly took her into a dark part of the scene where she was made to undress; and that the encounter with the robbers was brief. In those circumstances, it was essential to have inquired into the question of the distance between where PW2 was engaged by the robbers, the quality and intensity of the light which assisted PW2 in making the identification. See **Paul Etole & Another vs. R.** CA No. 24 of 2000. It is a cardinal duty and indeed, a matter of law that the first appellate court must put the evidence presented before the trial court to a fresh scrutiny and to arrive at its own determination, while bearing in mind that it neither saw nor heard any of the witnesses. The first appellate court unfortunately only paid lip service to this duty.

It is difficult to believe that in the circumstances in which PW2 found herself, confronted by a large number of armed (with knives) robbers who were strangers to her in the dead of night, PW2 was able to identify the appellant, yet she was categorical that she could not see those who attempted to rape her. She did not say how long the encounter lasted. Without describing before the parade any physical features of the appellant, we do not see how she was able to pick him out from the rest of the other people in the parade, especially after a lapse of 9 days after the robbery.

All these raise serious doubt as to whether the conditions for identification were conducive. This, coupled with the fact that PW2 was not able to identify the assailants who attempted to rape her, puts to question the credibility of her evidence.

Due to these weaknesses in the evidence of identification, mistaken identification was highly likely in the circumstances, particularly considering the appellant's defence, that he was on his way home from work at the time of his arrest. Moreover, he was not found in possession of any weapon or anything else to link him with the robbery.

Consequently, this appeal has merit and we accordingly allow it. We quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise held for any lawful reason.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

ASIKE – MAKHANDIA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRA