IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 9 OF 2018

BETWEEN

KASSIM BAKARI SEBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Ongeri, J.) dated 22nd March, 2016

in

H.C.CR.A No. 22 of 2013)

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JUDGMENT OF THE COURT

1. On 6th December, 2009 at around 4:00p.m. while Samuel Odhiambo (PW1) was making his way to see a friend in Magorofani area in Kisauni, he came across four men who were seated by the roadside. One of them accosted him demanding Kshs.20 and when he informed the said man that he had no money on him, the man become agitated and threatened him. By that time the man in question was standing in front of Samuel but Samuel decided to ignore him and continue on his way.

2. However, the man blocked his way and brandished a knife. He then tried to snatch an envelope that Samuel was holding but Samuel was not willing to let go of the same. As a result, a scuffle ensued between the two resulting with the armed assailant stabbing Samuel on his lip. Thereafter, the other three men joined in and started assaulting Samuel. Fortunately, there were children playing around the area, some of whom the appellant believed were his students. It was Samuel's testimony that the said children pleaded with the assailants not to kill him. Be that as it may, the last thing the appellant remembered was that he was hit from behind with a metal rod and he fell down unconscious.

3. Meanwhile, Mohamed Ali Mwangole (PW3) who lived nearby was drawn to the noise coming from the scene and decided to find out what was going on. He saw a large crowd gathered around Samuel who was bleeding and unconscious. As a Good Samaritan Mohamed took Samuel to a nearby clinic for medical attention.

4. Afterwards when Samuel came around he informed Mohamed what had transpired. It is also at that point that Samuel discovered that his mobile phone make Alcatel, ATM card, NHIF & NSSF cards, identification card and Kshs.10 were missing. With the assistance of Mohamed, Samuel was able to get in touch his brother, Joshua Otieno Ochiel (PW2) who took him to Nyali Police Station to report the incident.

5. As per Samuel, the assailants were familiar to him since he used to see them within Magorofani area save that he did not know them by name. Thereafter, on 12th January, 2010 while passing through the said area Samuel spotted the appellant and immediately recognized him as one of the assailants who had attacked him on the material day. He alerted PC Charles Mwai (PW5) and led him to arrest the appellant.

6. Consequently, the appellant was arraigned in the Chief Magistrate's Court at Mombasa wherein he was charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***. Based on the aforementioned evidence, the appellant was placed on his defence. He gave unsworn statement denying the charge preferred against him.

7. Upon applying its mind to the evidence before it and the law, the trial court found that the prosecution had proved its case against the

appellant. Consequently, the appellant was convicted and sentenced to suffer death. Aggrieved with the conviction, the appellant filed an appeal in the High Court which was dismissed by a judgment dated 22nd March, 2016.

8. Unrelenting, the appellant has filed this second appeal before us predicated on the grounds that the learned Judge (Ongeri, J.) erred by-

> ***i. Failing to properly re-evaluate the evidence on record in line with his duty as the first appellate court.***
>
> ***ii. Denying the appellant the right to legal representation hence violating his right to a fair hearing.***
>
> ***iii. Upholding the sentence meted out by the trial court which was extremely harsh and unconstitutional.***

9. At the plenary hearing, Miss Otieno, learned counsel for the appellant faulted the learned Judge for not properly re-evaluating the evidence on record. According to counsel, if he had, the learned Judge would have noted that the charge sheet was at variance with the evidence adduced by the prosecution. A case in point being that whilst Samuel gave evidence that the appellant was armed with a knife the charge sheet did not reflect as much. Further, the items listed under the charge sheet as having been stolen do not tally with Samuel's testimony.

10. Besides, Samuel did not give a description of his attackers to the police. She also urged us to draw an adverse inference against the prosecution for failing to call the children who are said to have witnessed the incident to give evidence. We also understood counsel to argue that the appellant was not given a fair trial since he was not represented by an advocate in the trial court.

11. Miss Otieno also took issue with the sentence which she perceived as being harsh and contrary to the holding of the Supreme Court in **Francis Karioko Muruatetu & another vs. R [2017] eKLR**. She went on to submit that the the learned Judge had failed to take into account the mitigating factors before confirming the sentence. In conclusion, Miss Otieno implored us to allow the appeal.

12. In support of the appellant's conviction, Mr. Isaboke, Senior Prosecution Counsel, contended that the recognition of the appellant as one of the robbers was positive and free from error. Nonetheless, he conceded that the sentence meted out was harsh and asked for the same to be substituted with an appropriate sentence.

13. We have considered the record, submissions by the appellant and counsel as well as the law. In determining the appeal before us, we bear in mind that this being a second appeal, the limit of this Court's jurisdiction is delineated under ***Section 361*** of the ***Criminal Procedure Code***. We are bound to entertain only issues of law. Nonetheless, we can interfere with findings of fact by the two courts below where they are not based on any evidence at all, or on a misapprehension or perverted construction of the evidence. See **Dzombo Mataza vs. R [2014] eKLR** .

14. It is not in dispute that none of the stolen items were recovered and the only evidence connecting the appellant to incident was that of identification. It goes without saying that where the only evidence against an accused person is that of identification, such as in this case, a court should be careful to ensure that such evidence is cogent to warrant conviction of the accused person otherwise a miscarriage of justice may arise.

15. The rationale for such caution is due to the fact that in as much as a witness may be truthful he/she can be mistaken when it comes to identification of a perpetrator due to a number of reasons. The aforementioned caution was restated by this Court in ***Hamisi Swaleh Kibuyu vs. R*** **[2015] eKLR** as herein under:

> ***"We are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU versus REPUBLIC (1975) EA 139). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit."***

16. Did the two courts below take into account the above caution? From the record it is clear that they were conscious of the same; whether or not the caution was applied is another matter altogether. We say so because firstly, Samuel maintained that he knew his attackers prior to the incident save that he did not know them by name. It was the prosecution's case that he informed the police as much when he reported the incident.

17. However, it is clear from the record, that while Samuel gave his evidence he stated he was able to recognize the appellant by a scar he had under his jaw. Was this description or identifying mark given to the police or at least the first person he relayed the incident to? No it was not. Does this bring into question the veracity of the recognition evidence? Our concern is fortified by the case of ***Maitanyi vs. R*** **[1986] KLR 198** wherein this Court observed:-

> ***"There is a second line of inquiry 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…… If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description."*** *[Emphasis added]*

18. Secondly, Mohamed testified that he was informed by some of the area residents that it was *Bable* and *Kembo* who had attacked Samuel. In his testimony, Mohamed said that he took Samuel to where the above mentioned persons lived. In that regard, PC Charles stated that he did not carry out investigations in respect of those allegations. The questions that then arise are; Who were these people? Why weren't the residents who gave that information not questioned or at least called as witnesses? Did any of the said names relate to the appellant?

19. Thirdly, Samuel testified that there were children at the scene who saw everything. Once again PC Charles stated that the police did not

follow up on the children. Could these children have placed the appellant in the scene or absolved him of any culpability? This scenario brings to our minds the case of ***Ibrahim Anakeya & Douglas Nyangwara Maobe vs. R*** **[2019] eKLR** and in particular this Court's sentiments:

> ***"By virtue of Section 143 of the Evidence Act, the prosecution is under no obligation to call any number of witnesses to prove a fact. It is only where the prosecution calls evidence that is barely adequate or marginal that a court may be entitled to draw an adverse inference that if the relevant evidence was tendered then such evidence would have been adverse to the prosecution's case. See this Court's decision in Safari Charo Koyo vs. R [2017] eKLR."*** *[Emphasis added]*

Based on the foregoing we doubt whether the appellant's recognition was free from error.

20. There is also the issue of the charge sheet being at variance with the prosecution's evidence. The particulars of the charge sheet in question read as follows:

> ***"On the 6th day of December, 2009 at the Coast Province, the appellant jointly with others not before court while armed with offensive weapons namely iron bars robbed Samuel Odhiambo of one mobile phone make Alcatel, National Identity Card all valued at Kshs.4,000 and or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Odhiambo."***

As Miss. Otieno rightly noted there was no mention of the knife allegedly used by the appellant to stab Samuel. It is settled that not all defects in a charge would render a conviction a nullity. What was the consequence of the said variance?

21. This Court while considering the same issue in ***Joseph Kakei Kaswili vs. R*** **[2017]eKLR** expressed:

> ***"Udo Udoma Chief Justice of Uganda (as he was then) in State of Uganda versus Wagara [1964] E.A. 366, at page 368, stated inter alia that in the absence of any amendment, the prosecution was bound by the particulars of the charge. In Furo versus Uganda [1967] EA 632, the same Chief Justice Udo Udoma faulted the trial magistrate for relying on evidence that was at variance with the particulars of the charge without amending the charge, and re-aligning it to the evidence tendered by the prosecution. In Mwasya versus Republic [1967] EA 345, the Court held inter alia that where a crucial issue of fact is not contested in any trial, the variance between the charge and the evidence tendered is curable under section 382 of the Criminal Procedure Code. In Yongo versus Republic [1983] KLR 319, the Court held inter alia that a charge is defective where it inter alia gives a misdescription of the alleged offence in the particulars. In Kimeu versus Republic [2002] 1 KLR 756, the Court held inter alia that not every conflict between the particulars of the charge and the evidence will vitiate a conviction especially where the conflict is minor or of such a nature that no discernible prejudice is caused to the accused."*** *[Emphasis added]*

In our view, the variance between the charge sheet and the evidence was such that it was not capable of being cured under ***Section 382*** of ***the Criminal Procedure Code***. This is because the presence of a knife went to the alleged recognition of the appellant and the role he played in the incident. As such, the appellant's conviction could not be based on the said charge sheet.

22. The net effect of the foregoing, even without delving into the other grounds of appeal, is that the prosecution failed to prove its case against the appellant beyond reasonable doubt. To that extent, we associate with Lord Sankey speech in **Woolmington vs. DPP [1935] UKHL 1** where he said:

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*** *[Emphasis added]*

23. For the above reasons, we find that the appeal has merit and is hereby allowed. We hereby set aside the appellant's conviction and the sentence meted out to him and substitute the same with an order acquitting him of the charge of robbery with violence. We direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 4th day of April, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR