IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 73 OF 2016

BETWEEN

MICHAEL KERUE WANJIRU …… APPELLANT

AND

REPUBLIC …….... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi **(Nyamweya & Kimaru, JJ.)** *dated 9th December, 2013*

in

HCCRA NO. 112 OF 2010)

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JUDGMENT OF THE COURT

[1] The appellant, **Michael Kerue Wanjiru,** was tried before the Senior Resident Magistrate's Court at Kibera for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code.** He was convicted and sentenced to death. His appeal to the High Court against conviction and sentence was dismissed.

[2] The appellant is now before us in this second appeal. In a memorandum of appeal filed by his advocate, **Mr. Ondieki,** the appellant has raised 11 grounds in which he faults the first appellate court for erring: by relying on written submissions to the prejudice of the appellant; by confirming the conviction on the basis of a defective charge sheet; by relying on evidence of recognition that was mistaken; by relying on circumstantial evidence of the weakest kind; by convicting on the offence of robbery with violence contrary to **section 296(2)** when the same was not proved; by failing to analyze and consider the defence of the appellant; by misdirecting itself on the law and applying wrong principles; by sentencing the appellant to a sentence of death which is a sentence that is inhuman and degrading; and by finding that **Article 50(1)&(2)** of the **Constitution** were not applicable.

[3] During the hearing of the appeal, Mr. Ondieki, relied on written submissions that he had duly filed. Counsel urged the Court to allow the appeal, maintaining that the appellant's identification was not proper; that the offence took place at 9.30 p.m. when circumstances were not favourable for a positive identification; that recognition even of a person known, could be mistaken; that there was no evidence adduced of any description given by the complainant in the first report or naming the appellant as his assailant; that the charge sheet was defective; that the charge was never proved beyond reasonable doubt; that there were critical witnesses who were never called to testify; and that there were various misdirection made by the trial magistrate.

[4] Mrs. Murungi, learned counsel who appeared for the Director of Public Prosecutions, opposed the appeal maintaining that the appellant was positively identified by the complainant, and that the learned judges were guided by appropriate authorities.

[5] This being a second appeal, the jurisdiction of this Court is limited under section 361(1) of the Criminal Procedure Code to considering matters of law only. Secondly, this Court must defer to concurrent findings of facts made by the two lower courts, and only interfere with the findings if it is established that the trial court or the first appellate court misdirected itself on the facts or the law or took into account extraneous factors.(see ***David Njoroge Macharia – v- R, [2011] eKLR; and Chemagong vs. Republic (1984) KLR 213)*** We also take note of the fact that unlike the trial court, we do not have the advantage of seeing and assessing the demenour of the witnesses.

[6] During the trial, there were three witnesses who testified for the prosecution. The first witness was the complainant, Stephen Kogi

Mwangi (Stephen). He explained how he was attacked and robbed at about 9.30p.m. when he was trying to gain access into his house; that although his attackers were many, he recognized the appellant whom he knew before and whose uncle was the owner of the plot where Stephen lived; that there was light near where the appellant and his group were standing; that the appellant took a Somali sword from his trouser and flashed Stephen's face with a torch as the others held Stephen from behind and emptied his pockets. Among the items of which Stephen was robbed were: a mobile phone, Kshs.25,500/=, Equity Bank ATM Card, and Stephen's National Identity Card. The next day, Stephen borrowed a phone from his neighbour and upon calling his telephone number, the appellant who apparently had Stephen's phone warned him that if he made a report to the police, he would kill him. Stephen nevertheless, made a report to the police. Stephen later saw and identified the appellant to the police and he was arrested.

[7] The second witness **PC. Vincent Taalam Cherop** an officer attached to Karen Police Station was on patrol duty when Stephen approached him for assistance to arrest a suspect whom he complained had stolen from him. Stephen identified the suspect as the appellant who was then in a club, and PC Cherop arrested the appellant. **Corporal Richard Matoke,** an officer attached to Karen Police Station, testified that he was the investigating officer. Although nothing was recovered from the appellant, he relied on the report made by Stephen and caused the appellant to be charged.

[8] In his defence, the appellant denied having committed the offence, maintaining that on the material night he was on duty up to 11.00p.m.

[9] In her judgment, the trial magistrate found that there was light where Stephen was robbed and that Stephen recognized the appellant as he knew him before. The trial magistrate believed the evidence of Stephen, and rejected the defence of the appellant that he was not at the scene. She therefore found the appellant guilty and convicted him of the charge.

[9] The appellant's appeal against the judgment of the trial court was dismissed by the learned Judges of the High Court who found that the appellant's plea was properly taken; and that in accordance with **Anjononi & Others vs Republic [1976–1980] KLR 1566,** Stephen having stated in his report that he knew his assailant whom he recognized as the appellant, there was no need for a description or identification parade as the appellant was positively recognized. The learned judges concluded that there was sufficient evidence to prove the offence of robbery with violence as the appellant was identified at the scene of the robbery, and threatened Stephen with a sword with which he was armed. The learned judges therefore dismissed the appeal.

[10] It is evident that the conviction of the appellant was anchored on his identification by Stephen only. Therefore, the main issue for consideration in this appeal is whether the identification of the appellant by Stephen was safe to rely on. In ***Abdalla bin Wendo v R (1953) 20 EACA 166,*** the former Eastern Africa Court of Appeal cautioned that:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness…. The danger, is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification…."***

[11] In the House of Lords decision in ***R vs. Turnbull and others (1976) 3 All E.R. 549***, which decision has been applied locally in many cases, Lord Widgery C.J. gave the following practical guidance on identification of an accused person:

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance""***

[12] In ***Anjonini v The Republic (1976-1980) KLR 1566, Madan JA*** (as he then was) stated as follows:

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in the possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailants is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."***

[13] It is appropriate at this stage to reproduce the pertinent part of the judgment of the trial magistrate in which he analyzed the case against the appellant:

> ***"The issue before this court is whether accused robbed complainant of his property.***
>
> ***The complainant through Exhibit 1&2 proved to the court that he had the phone and cash 25,500/= which was the day's collection from climax coach. He indicated to the police on the day he wrote his report that Michael stole from him. He had known Michael because the house he lived in belonged to accused uncle. There were (sic)light in that place where he was robbed. He had seen accused and the two others before they robbed him. He even passed them as he went to open the door.***

Complainant called police on 22/4/2009 to arrest accused who had robbed him on 5/2/2009.

I find that accused was well known to the complainant. He even talked to accused on his phone after he was robbed. He told the man who had the phone that he wanted to talk to Michael."

[14] It is evident from the above that the trial judge did not appreciate that the main issue before her was the propriety of the identification evidence which was the only evidence against the appellant. Nor did she appreciate that she was dealing with the evidence of a single witness, and had to warn herself of the danger of convicting on the evidence of identification by a single witness. As a result, the trial magistrate failed to keenly interrogate the circumstances in which the identification was done in order to rule out the possibility of a mistaken identification albeit an honest mistake.

[15] The trial magistrate accepted that there was light in the place where Stephen was robbed. Nevertheless, this evidence needed deeper consideration. According to Stephen's evidence there was light where the people who robbed him were standing. However, Stephen did not state what kind of light it was, and where the light was situated. One is left wondering whether the light was electric light from a street light, or light from the shops which he claimed had not been closed, or light from a different source. Nor was any evidence given or enquiry made, with regard to the intensity of the light. This was important as Stephen also testified that the appellant had a torch which he flashed on Stephen's face. The presence of the torch implied that there was need for additional lighting and therefore the available light may not have been strong enough. This was not ruled out. Secondly the fact that the flashed torch was directed at Stephen's face means that Stephen's vision and ability to see properly was interfered with.

[16] In addition, Stephen testified that he knew the appellant and that the appellant's uncle was his landlord. However no effort was made to get the appellant through his uncle until two months later when Stephen purported to have recognized the appellant's voice in a club, and through help from a police officer had the appellant arrested.

[17] In determining the first appeal, the learned judges of the High Court addressed the issue of identification as follows:

"On the issue of positive identification of the appellant, we are guided by the Court of Appeal decision in Anjonini and Others v Republic (1976-1980) KLR 1566 that when it comes to identification the recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger, because it depends upon some personal knowledge of the assailant in some form or other. PW1 stated that he knew the appellant from before, and that he had known him since 2002, and that he even called him after the robbery. He also stated when reporting the robbery that he knew the appellant. There was thus no need for a description of the appellant or identification parade as this was a case of recognition, and we accordingly find that the appellant was positively identified."

[18] From the above and indeed the whole judgment of the High Court, the learned judges have not addressed the fact that the appellant's identification was by a single witness, or the need to exercise caution. Nor did the learned judges address the circumstances in which the appellant was identified, the proximity and sufficiency of the lighting, or the possibility of error in the identification by the witness, even of a person well known to him.

[19] It is evident that the learned judges of the first appellate court did not take into consideration the important dictum by Lord Widgery CJ, in ***R v Turnbull*** (supra) that:

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[20] Another important decision of this Court that the learned Judges ignored is ***Kiilu & Another V. Republic [2005] 1 KLR 174*** in which this Court gave directions on dealing with the evidence of a single witness as follows:

"Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule 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. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

[21] In this case the identification of the appellant was made by Stephen, a single witness, under very difficult circumstances. Nothing was recovered from the appellant nor was there any other independent direct or circumstantial evidence that implicated the appellant with the offence. We find that the two lower courts failed to properly direct themselves on the facts and the law on the issue of identification. Nor did they rule out the possibility of a mistaken identification.

[22] We believe we have said enough to come to the conclusion that the appellant's conviction was not safe. Accordingly, we allow this appeal, quash the appellant's conviction and set aside the sentence imposed upon him. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 28th day of June, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR