IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 199 OF 2014

BETWEEN

DAVID CHETI MWITANI.....1ST APPELLANT

THOMAS ALIERO IKOLOMANI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal arising from the judgment of the High Court of Kenya at Bungoma (Ombija & G.B.M Kariuki, JJ) dated 21st May, 2008

in

H.C.CR.A. Nos. 84, 86 & 87 of 2002)

****

JUDGMENT OF THE COURT

1. **David Cheti Mwitani (David)** and **Thomas Aliero Ikolomani**, **(Thomas)** who are the appellants herein were tried together with three other co-accused before the Senior Principal Magistrate's Court at Bungoma on two counts of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code Chapter 63, Laws of Kenya. The two appellants and **Moses Bahati Wanyonyi (Moses)** one of the co-accused, were convicted of the charges and each sentenced to death on each count.

2. During the trial eleven witnesses testified who included Margaret Omukobi (Margaret) the complainant in the first count; Leah Muthoni Maina (Leah) the complainant in the second count; Dedan Kimathi Kinuthia (Dedan); Nancy Muthoni (Nancy) and Bernard Shikuku (Bernard) who each purported to have recognized one of the accused persons during the robbery.

3. Aggrieved by the judgment of the trial court, the two appellants and Moses each preferred an appeal to the High Court. The appeals were consolidated and heard by the learned judges of the High Court who delivered a judgment in which they upheld the judgment of the trial court in regard to the two appellants and dismissed their appeals. However, the learned Judges but found that although Moses was properly identified by Nancy in regard to another robbery, there was no complainant in regard to that robbery. The learned judges therefore allowed the appeal in regard to **Moses**, and quashed his conviction.

4. The two appellants, being dissatisfied with the judgment of the High Court filed a second appeal before this Court on the grounds that the first appellate court erred in law and in fact in: failing to appreciate the glaring contradictions in the evidence adduced by the prosecution witnesses; failing to appreciate that the appellants were not positively identified and that the identification parade was irregular; failing to warn itself of the dangers of relying on the evidence of the appellant's co-accused; failing to re-evaluate the evidence; and failing to appreciate that the facts of the case were not sufficient to support a conviction under section 296(2) of the Penal Code.

5. During the hearing of the appeal, learned counsel **Ms. Omollo**, appeared for David, learned counsel Mr Ojuro appeared for Thomas, whilst Mr Tumaini Wafula of the DPP's office appeared for the State. In arguing the appeal each counsel abandoned the original grounds filed by the appellants in person, and made oral submissions relying on the supplementary memorandum of appeal that each appellants had filed. In addition, counsel relied on authorities that had also been filed.

6. In her submissions **Ms Omollo,** reduced David's grounds into three main clusters. First, the failure of the first appellate court to re-

evaluate the evidence that was adduced in the trial court; second, the issue of identification; and thirdly, the efficacy of the evidence upon which the appellant was convicted. Counsel submitted that although the evidence of **Margaret** and **Leah** was the basis of David's conviction as the witnesses purported to have identified David during the robbery, this evidence was vitiated by the apparent confusion on the parade forms that were produced in evidence.

7. Ms Omollo argued that the parade forms were not consistent with the evidence of the witnesses as to the person each witness identified; that the identification parade report indicated that **Margaret** and **Mary** failed to identify David, but that Jane was the one who identified David; that the identification of David by **Leah,** was no more than dock identification as the identification parade forms indicate that although Leah was listed as a witness, she was not able to identify any of the appellants; and that had she identified David, **Leah's** testimony that she remembered David's forehead as a special feature, should have been recorded in the identification parade report. In addition counsel submitted that Dedan who was said to have identified David testified that he identified Moses and not David.

8. Ms. Omollo faulted the learned judges of the High Court for failing to evaluate the evidence or resolve the apparent confusion on identification; that although Leah purported to identify David her evidence was confused and inconsistent with the results of identification as indicated in the parade forms; and that neither the trial court nor the first appellate court addressed the issue of the nature and intensity of the light.

9. **Mr. Ojuro**, faulted the 1st appellate court for failing to evaluate the evidence and failing to note the contradictory evidence that was adduced by the prosecution witnesses. In this regard **Mr. Ojuro** submitted that **Leah** testified that the appellants were veiled and did not indicate how she was able to identify the appellants; that although Thomas was identified by **Margaret** in an identification parade, **Benard** who identified him in the dock did not attend the identification parade and therefore the trial court and the learned judge misapprehended the evidence in finding that **Bernard** identified Thomas at an identification parade. In addition **Mr. Ojuro** faulted the learned judges for relying on the evidence of the co-accused and failing to note that the trial court rejected the evidence on the co-accused in regard to the identification of one of the accused persons in the trial court (Alfred Okuna); and there was therefore no basis for the conviction of Thomas if the other co-accused was acquitted.

10. **Mr. Wafula**, urged the court to dismiss the appeal, submitting that **Margret** identified Thomas while **Leah** identified David; that there were lights in the shops where the robberies occurred; that the identification of the appellants was not flawed; and that the essential ingredients of the offence of robbery with violence were proven beyond reasonable doubt. On the alleged discrepancies and inconsistencies, Mr. Wafula urged the court to apply section 382 of the Criminal Procedure Code in accordance with the case of **John Maina Mwangi vs. Republic** Criminal Appeal No. 73 of 1993.

11. This being a second appeal, we are by dint of **section 361 (1) (a)** of the Criminal Procedure Code obligated to consider only issues of law raised in the appeal and not to consider matters of fact. Secondly, this Court has to defer to the findings of the two lower courts on facts and will only interfere with the concurrent findings of fact by the trial court and the first appellate court if it is demonstrated that those two courts 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. (**See Karani v. Republic [2010] 1 KLR 73)**.

12. In addition, as this Court stated in **M'Riungu v. Republic (1983) KLR 455**:

> ***"Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."***

13. We have considered the appeal, together with the submissions of counsel for the appellants and the State and the relevant authorities cited. The main issue is whether the first appellate court properly re-evaluated and considered the evidence that was adduced in the trial court; and whether the appellants were properly identified as having participated in the robbery.

14. The duty of the first appellate court to re-evaluate the evidence and make its own findings in deciding whether the judgment of the trial court should be upheld is well reiterated in **See Okeno v R [1972] EA 32**:

15. In their judgment, the learned judges of the High Court rendered themselves thus:

> ***"Having re-evaluated the evidence before the lower court, we have come to the irresistible conclusion that the first appellant, David Cheti Mwitani was properly identified by Margaret Omukabi (PW1) and Leah Maina (PW11). The second appellant Thomas Aliero Ikolomani was properly identified by Benard Shikuku (PW8) and Margaret Omukabi (PW1). The third appellant Moses Bahati Wanyonyi was properly identified by Nancy Muthoni (PW5) but there was no complainant in this case.***
>
> ***There was sufficient light in all shops where the robbers struck. The co-accused-Alfred Tom Okuna- corroborated the testimony of the witnesses that identified the 1st and 2nd appellants….but even without the evidence of Alfred Okuna, there was sufficient evidence to nail appellants 1 and 2. In the result we dismiss the appeal against the 1st and 2nd appellants."***

16. From the above extract it is evident that the High Court relied on the evidence of Margret and Leah in convicting the appellants. From the evidence, only Leah was able to identify David and only Margret was able to identify Thomas making the identification of each of the appellant's identification by a single witness. In **Peter Kifue Kiilu & Another v. Republic [2005] 1 KLR 174** this Court stated 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." [Emphasis added].

17. In regard to Thomas, Margaret testified and identified him in the dock as having been among the robbers who attacked her. She stated that Thomas was the one who pushed her into the shop and that she was able to see him during the robbery because there was light in the shop. Margaret also stated that she identified Thomas during the identification parade. However, the evidence of inspector **Stephen Ringera** who conducted the identification parade was that he conducted an identification parade in which Margaret failed to identify **Alfred Okune** but identified David. There was no evidence adduced of any identification parade having been conducted in which Margaret identified Thomas. It is evident that neither the trial court nor the first appellate court addressed the evidence of Inspector Ringera or this apparent and material contradiction.

18. Leah was another material witness who identified David in her evidence as one of the persons who robbed her. The robberies happened at 9.00pm, but Leah maintained that there was light and that she was able to see her assailant. It is noteworthy that Leah testified that her assailants had covered themselves with a veil and that he was only able to see the face and the forehead. Although Lean testified that she attended an identification parade in which she identified David, this evidence is contradicted by the evidence of Inspector Ringera who testified to having conducted the parade but made no mention of Leah having identified David. According to Inspector Ringera, the identifying witnesses for the parade that was done for David were Margaret who identified him at the parade, and Nancy and Wanjiru who failed to identify David.

19. The parade forms that were produced in evidence as exhibit no. 2 show Leah as having been one of the witnesses in regard to the identification parade for David, but indicates that only Dedan identified David during the parade. Nevertheless, this is inconsistent with the evidence of Dedan who testified that when he was called to the identification parade, he identified Moses. Dedan did not mention David in his evidence nor did he testify to having seen him during the robbery.

20. In light of these contradictions and inconsistencies which were not resolved, it is evident that the learned judges of the High Court failed to carry out their duty of subjecting the evidence of the trial court to a fresh analysis and re-evaluation. As was reiterated by the predecessor of this Court in ***Roria vs. Republic [1967] EA 583*** the need for testing with the greatest care the evidence of identification by Margaret and Leah was imperative. More so because the evidence of identification of each appellant rested on the evidence of a single witness. We find that given the evidence of identification that was before the trial court the possibility of a mistaken identification could not be ruled out. Moreover, the evidence was neither cogent nor safe to rely upon to sustain the conviction of the two appellants. We find that the learned judges ought to have given David and Thomas the benefit of doubt.

21. In the circumstances, we allow this appeal, quash the conviction of each appellant and set aside the sentences imposed. The appellants shall each be set free unless otherwise lawfully held.

Dated and delivered at Kisumu this 31st day of July, 2019.

E. M. GITHINJI

.....

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.