IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 105 OF 2015

BETWEEN

RAJAB IDDI MUBARAK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale, ***(Ombija & Mwilu, JJ.)*** *dated 20th June, 2011*

in

HCCRA NO. 23 OF 2008)

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JUDGMENT OF THE COURT

[1] Rajab Iddi Mubarak, who is the appellant before us was tried and convicted by the Principal Magistrate at Kitale for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code.** He was sentenced to death. His appeal against his conviction and sentence was dismissed by the High Court. He is now before us in yet another appeal.

[2] In his memorandum of appeal that was filed in person, the appellant has raised seven (7) grounds faulting the learned judges of the High Court in failing to consider that the circumstances prevailing at the time of the alleged attack were not favourable for positive and reliable recognition of the assailants; relying on evidence of recognition without sufficient evidence; failing to consider that the appellant's conviction was anchored on uncorroborated evidence, full of contradictions and hearsay; and failing to note that the complainant's identification of the appellant was only dock identification as the complainant did not identify his assailant in his first report.

[3] During the hearing of the appeal, the appellant was represented by Mr. Angu Kitigin. In arguing the appeal, Mr. Kitigin, focused on the issue of identification. He submitted that the evidence of the two identifying witnesses was contradictory and did not reveal the exact location of the Kiosk where the witness was standing, and the distance from there to the shops where the electric light they allegedly used to identify the appellant was; that the High Court admitted that there were contradictions in the evidence of the identifying witnesses; that the identification evidence was not watertight as the complainant did not identify his assailant in an identification parade nor did the court warn itself of the danger of convicting on the evidence of a single identifying witness; and that the possibility of a mistaken identification was not totally ruled out.

[4] Learned Prosecuting Counsel, Ms Oduor, who appeared for the State, opposed the appeal arguing that the appellant was positively placed at the scene of the crime, and identified through recognition. Counsel maintained that the identifying witness knew the appellant well as the appellant was the grandson of a village elder. Ms Oduor ruled out the possibility of a mistaken identification, as the witness struggled with the appellant for a while and had ample opportunity to see him. In addition, the witness gave the name of the appellant at Moisbridge Police Station. Counsel argued that although there were minor contradictions, they were not material contradictions nor sufficient to dislodge the identification.

[5] This being a second appeal our mandate as an appellate Court is circumscribed under **section 361** of the **Criminal Procedure Code** to matters of law only. As was stated in ***Karingo vs Republic [1982]*** KLR 213,

"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. (Reuben Karoti s/o Karanja vs Republic [1956] 17 E.A C.A 146)."

[6] The main witnesses against the appellant were the complainant John Kahukha Nanasamba (complainant), who testified that he was attacked and robbed by two (2) people one of whom he identified as the appellant. The second witness was James Mwangi, a watchman who was on duty in the vicinity. This watchman testified that he saw the complainant being attacked by four (4) youths who were armed with pangas and rungus, and that he went to the complainants' aid and managed to fight off the assailants. Both witnesses testified that there was electricity light from a shop nearby which enabled them to identify the appellant. The two witnesses each proceeded to the Police station and made a report.

[7] The complainant claimed that he knew the appellant physically but did not know his name. However, his identification of the appellant was clearly doubtful. He appears to have entirely relied on the watchman who identified the appellant as the grandson of Mzee Juma known as Rajab. Indeed, it is this watchman who identified the appellant to the police by name leading to the appellant being arrested. As the complainant was not present during the time of the appellant's arrest, his identification of the appellant was nothing more than dock identification.

***[8] In Ajode vs Republic [2004]** 2 KLR, this Court held that dock identification is "generally" worthless and a court should not place much reliance on it unless preceded by a properly conducted identification parade. This should be considered in light of, **Muiruri & 2 Others vs Republic, [2002]** 1KLR 274, where this Court had held that it cannot be said that all dock identification is worthless. The Court may base identification on such evidence if satisfied that on the facts and circumstances of the case, the evidence must be true and if the court had warned itself of the danger of mistaken identification.*

***[9] The** watchman was clear in his evidence that he identified the appellant whom he knew well by name as Rajab, and that he struggled with the appellant as he intervened in an attempt to stop the appellant and his colleagues from robbing the complainant. This witness is the one who informed the complainant the name of the appellant. The witness was also the one who made the first report to the police where he clearly identified the appellant by name to PC Joseph Nzau who managed to arrest the appellant. Therefore, it is evident that the conviction of the appellant was anchored on his identification by this watchman.*

***[10] In Maitanyi vs Republic [1986] KLR 198,** this Court held as follows:*

"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction".

***[11]** From the judgment of the trial court, it is evident that the trial magistrate was alive to the responsibility stated in **Maitanyi vs Republic** (Supra) as she warned herself of the danger of relying on the evidence of identification by a single witness. The trial magistrate also considered the circumstances of the identification before coming to the conclusion that the identification by PW2 was free of any error. Similarly, the learned judges of the High Court considered the evidence of the watchman and the circumstances of his identification and was satisfied that the evidence of this witness could be relied upon notwithstanding the apparent contradiction concerning the number of the people who attacked the complainant.*

***[12]** On our part, we are satisfied that the appellant was identified by recognition and that although it was at night, there was electricity light which made recognition possible. Secondly, the watchman struggled with the appellant for a while and was therefore able to recognise him. Thirdly, the watchman gave the name of the appellant to the police immediately he reported the incident. The evidence of complainant coupled with the evidence of the watchman leaves no reasonable doubt that the appellant was at the scene of the incident and his defence denying knowledge of the offence was properly rejected.*

***[13]** As regards the sentence, the appellant who was treated as a first offender was sentenced to death.* The Supreme Court in ***Francis Karioko Muruatetu & Another vs Republic [2017]** eKLR,* Petition No.15 of 2015, stated as follows:

"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."

[14] Like **Section 204, section 296(2)** of the **Penal Code** that provides a mandatory death sentence, and therefore the principle enunciated by the Supreme Court would apply in this case. It is clear that the trial magistrate was of the view that the only lawful sentence for robbery with violence under section 296(2) of the Penal Code is death. This is a clear indication that the trial magistrate did not exercise her discretion in

sentencing. Although the appellant did not say anything in mitigation, opting to maintain his innocence, he was treated as a first offender and therefore ought not to have been given the maximum penalty of death. This was a factor not considered by the first appellate court. We find that in the circumstances of this case given the injuries suffered by the complainant and the items of which he was robbed, and the appellant being treated as a first offender, a term of fifteen (15) years imprisonment would be an appropriate sentence. We therefore, allow the appellants appeal against sentence and substitute the sentence of death with a term of fifteen (15) years imprisonment.

[15] *The upshot of the above is that we dismiss the appellant's appeal against conviction but allow his appeal against sentence to the extent of substituting the death sentence with a term of fifteen (15) years imprisonment effective from the date of his conviction.*

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 19th day of April, 2018.

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.