IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, M'INOTI & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 161 OF 2014

BETWEEN

ERICK JUMA MBEA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu,

Aroni & Chemitei, JJ) dated 13th March 2012,

in

H.C.CR.A No. 166 of 2010)

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JUDGMENT OF THE COURT

Erick Juma Mbea, the appellant, was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of the offence were that on the 25th December 2009 at Nyamasaria area in Kisumu County jointly with others not before the court, he robbed Fredrick Otieno Wambura of one TV set, a bag containing assorted clothing, a mattress, and four pairs of shoes all valued at Kshs. 11,250 and immediately before or immediately after the robbery used actual violence on ***Fredrick Otieno Wambura (Fredrick) PWI.***

Briefly, the facts were that on the night in question, as PW 1 was passing by Tausi Bar and restaurant on his way home, three people approached him, and ordered him to put the items he was carrying down or they would kill him. Two stood behind him, and one in the front. The one in front of him was Erick Juma. Fredrick says that when he saw Erick with the aid of light from the bar he felt safe and called out to him, as he was from his village and was a neighbour. But Erick cut him on the left side of his head, and he fell down unconscious. He next recovered consciousness in the New Nyanza Hospital. He gave the name of Erick Juma to ***Anthony Omino Nyabuti, PW2, (Anthony)***, and to the police.

Anthony, a businessman, was on his way home, when he found people standing over a man who was lying on the road near Tausi Bar. He had been attacked. He took Fredrick to the hospital where he was admitted, and thereafter reported the attack to ***Cpl. Fares Nyagongo, PW3***. He gave the name of Fredrick's attacker as Juma, a person whom he knew to be of bad character.

Cpl. Nyagongo received the report of the attack from Anthony. He confirmed that both Anthony and Fredrick had mentioned that Erick Juma was the person who had attacked Fredrick.

The trial magistrate convicted and sentenced the appellant to death as prescribed by law upon finding that the offence of robbery with violence was proved beyond reasonable doubt. The appellant was dissatisfied with the decision, and appealed to the High Court (Aroni and Chemitei, JJ), which upheld the conviction and sentence of the trial court.

The appellant now prefers an appeal to this Court on grounds that can be summarised as follows; that the learned judges fell into error when they failed to appreciate that the charge sheet was defective; that the appellant was not properly identified, as there were inconsistencies and contradictions in the evidence; that vital witnesses were not called to testify; that common intention was not established among the joint offenders; that the appellant was wrongfully arrested; that no proper investigations were carried out; that the prosecution did not prove its

case beyond reasonable doubt, and instead shifted the burden of proof to the appellant; that the court did not take into account the appellant's defence, and that the defence's case was not displaced by the prosecution witnesses; that the High Court failed to reevaluate and analyse the evidence by dismissing the appellant's appeal on the basis of circumstantial evidence.

The appellant filed written submissions, which ***Mr. K'Opot***, his learned counsel relied upon in their entirety. In the submissions, the appellant abandoned a majority of the grounds and only sought to advance two grounds which were, whether the evidence of identification by recognition was sufficient to sustain a conviction; and whether the High Court properly reevaluated and analysed the evidence on identification, and in so doing arrived at the correct conclusion.

Turning to the issue of identification, it was submitted that the evidence that linked the appellant to the offence was of a single identifying witness, and that in those circumstances the court ought to warn itself of the dangers of conviction on such evidence; and to fully examine the conditions at the scene, the state of mind of the witness, whether the length of time of the attack was sufficient for identification, and whether the accused's name was mentioned in a first report.

It was argued that the name reported to the police was at variance with the appellant's actual name, which issue was not considered by both the trial court and the High Court. It was further submitted that the complainant testified that he became unconscious after being struck by a panga, and only regained his consciousness in the hospital; that he would not have given a name to Anthony at the scene when he was unconscious; that the report was not made until 2 days later; that no evidence was led on the exact date that the name was reported to the police or when he recognized the appellant; that it took two months to arrest the appellant yet he was known to the complainant. Counsel cited the case of ***Moses Monyua Mocheru vs Republic, CA Cr. App No 1987*** in support of the proposition that a first report to the police should be included in the evidence, and the case of ***Maitanyi vs.Republic, [1986] eKLR*** to support the contention that there ought to have been further inquiry into whether the complainant was able to give some description or identification of the appellant to those who came to his aid.

The appellant next faulted the High Court for failing to reevaluate the evidence, and contended that if it had done so, it would have appreciated that there were inconsistencies and anomalies in the evidence of identification, and on this basis would have found that the conviction was not safe.

On his part, ***Mr. Mule***, learned prosecution counsel for the State opposed the appeal, and on the issue of identification, submitted that the prosecution evidence was unequivocal; that the complainant knew the appellant, he saw him with the aid of lights from Tausi Bar and as the lights were only 5 metres away from the scene of attack, the area was well lit. It was further submitted that the appellant did not deny that the complainant knew him, and that his name was made known to the police at the earliest opportunity. Counsel pointed out that both the trial court and the High Court were conscious that they were relying on the evidence of a single identifying witness and duly warned themselves of that fact.

Regarding the allegation that the High Court failed to reevaluate the evidence, counsel contended that the appellant gave a sworn statement and did not call any witnesses; and that in his defence the appellant did not refer to the events of the night in question. On the other hand, the courts below appreciated that the evidence placed the appellant at the scene.

The case of ***M'Riungu vs Republic [1983] KLR 455*** sets out our duty as the second appellate court thus;

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

On the question of whether the appellant was properly identified, the appellant's case is that after the robbery Fredrick gave Erick's name to Anthony and the police in a first report, yet his statement indicated the name Juma J; that he could not have given any name immediately after the attack as he said that he became unconscious after being struck with the panga; that furthermore, the conditions on the night of the attack were not suitable for identification; and therefore the conviction was unsafe as it was based on Fredrick's evidence of a single identifying witness which could not be relied upon.

In addressing the question of whether the appellant was properly identified, after warning itself that it was relying on the evidence of a single identifying witness, the trial court concluded that the appellant was known to the complainant, and therefore this was a case of recognition and not identification.

Upholding the trial court's conclusion that this was a case of recognition, the High Court stated;

> ***"This is a case where reliance will be placed on the evidence of a single witness. The appellant, PW1 and PW2 are neighbours and known to each other. Therefore this is a case of recognition and not identification. It is said that recognition is better than identification. Although mistakes even in cases of recognition cannot be ruled out.***
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> ***We warn ourselves of the dangers of relying on the evidence of a single witness and with that in mind we note that the complainant PW1 was in a lit area at the time of the attack. This may have been done to silence him for having recognized the appellant but luckily he was not silenced by the injuries. He gave the appellant's name to PW2 who came to his rescue minutes after the incident and told the doctor that he knew one of the assailants. He also says he gave the same to the police. We believe him; that he recognized his attacker which earned him a panga cut."***

This Court addressed the requisite parameters for identification by way of recognition in the case of ***Peter Musau vs Republic [2008] eKLR*** thus;

> ***"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."***

When the above factors are applied to the facts herein, it can be established that they point to a case of identification through recognition, as Fredrick testified that he knew the appellant. He stated that;

> ***"He was Erick Juma- in front of me. I saw his face there were security lights from Tausi Bar and restaurant. I was 5 metres from the source of the light. There was a bright moon light. Erick accused had a panga. I did not identify the others. I felt save (sic) with my brother since I knew Erick. I called Erick by his name. He cut me with a panga on the left side of the head (scar seen)."***

On cross examination, he went on to state that;

> ***"I saw you well. I called out your Name. I told the police your name in the police station. You stood in front of me. You cut me with a panga when I called out your name. You faced me eye to eye. No mask was on your face."***

Fredrick was also categorical that he mentioned the appellant's name to the police when he stated that;

> ***"I mentioned your name in a first report of 26.12. 09. (statement read out) I told the police Erick Juma was one of the robbers."***

He went on to describe the appellant as his village mate and his neighbour.

Without doubt, it is evident that the appellant was no stranger to him, but was someone he had met before, to the extent that when he saw him on the night of the robbery, he knew that he was safe, until the appellant cut him. It is also instructive to note that, the appellant did not deny that Fredrick was known to him. As concluded by the courts below, and we agree, this was a case of identification through recognition which evidence is always ***"…more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."*** See ***Anjononi & others vs Republic [1980] KLR***.

As to whether there were contradictions in the name given in the first report, Fredrick testified that he called the appellant by his name, "Erick" Juma. He also gave his name to Anthony who took him to the hospital moments after the attack, and reported the name to Cpl. Fares Nyagongo. It is these two witnesses who referred to the appellant as "Juma".

We do not see that there were any contradictions in the use of the names "Erick", "Juma" or "Erick Juma", as both names belonged to the appellant, and he did not deny that he was known by both these names.

What was of importance is that Fredrick recognized the appellant, and called him by his name in a first report to Anthony and to Cpl. Fares Nyagongo. And as stated in the case of ***Terekali & another vs Republic [1952] EA,*** that a first report is a good test by which to ascertain the truth and accuracy of the events of the night in question, Fredrick having recognized the appellant and given his name in a first report, sufficiently pointed to him (the appellant), as being one of the assailants who robbed him on the night of the attack.

Despite reliance on the evidence of a single identifying witness, the courts below were nevertheless satisfied that the conditions for identification were satisfactory, and that Fredrick's evidence on identification was cogent and credible. Accordingly, we do not agree that the High Court failed to reevaluate the evidence on identification, or that there were contradictions and inconsistencies that the court failed to take into account. As such, having regard to the concurrent findings of fact by the two courts below, we too are satisfied that the appellant was properly identified and find that this was not a case of mistaken identity.

Accordingly, we find that the conviction was safe, and hereby dismiss the appeal.

Turning to the question of sentence, the appellant was sentenced to death; and since the delivery of the judgment of the High Court, the Supreme Court has held in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015*** that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the Penal Code is unconstitutional. The Court observed that:

> ***"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 an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, 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."***

We do not see any reason why this approach should not be applied to the mandatory sentence of death specified by ***section 296 (2)*** of ***the Penal Code*** in respect of a person convicted for the offence of robbery with violence or attempted robbery with violence.

But that said, though he is a first offender, the evidence shows that the appellant viciously attacked and injured the complainant, someone who was known to him. He then proceeded to rob him of various items. Having regard to the circumstances of this case, we see no reason to

review the sentence of the High Court.

In view of the aforegoing, we are of the view that this matter be referred

back to the High Court to determine the appropriate sentence applicable in the circumstances of this case, as this will allow the appellants an opportunity to mitigate and be sentenced accordingly

It is so ordered.

Dated and delivered at Kisumu this 7th day of December, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR