IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 20 OF 2017

BETWEEN

MWASHANGA MWADINGO……..……APPELLANT

AND

REPUBLIC……..……..……..……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Ibrahim & Ojwang, JJ.) dated 25th May, 2010

in

High Court Criminal Appeal No. 239 of 2006)

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JUDGMENT OF THE COURT

[1] Mwashango Mwadingo (the appellant) was charged before the Senior Resident Magistrate's Court Kwale with the offence of Robbery with Violence Contrary to **Section 296(2)** of the **Penal Code** in that on 29th day of March, 2005 at about 1.00 p.m., with others not before court while armed with simis and pangas, he robbed Nicasio Njiru Nyaga of money and several items listed in the charge sheet.

[2] He pleaded not guilty to the charge but after a full hearing in which six witnesses testified for the prosecution after which he gave an unsworn statement of defence, he was found guilty, convicted and sentenced to death.

[3] He was aggrieved with the conviction and sentence as he maintained all along that he had not committed the offence in question. He consequently moved to the High court where he preferred an appeal against both conviction and sentence on grounds of identification; his defence not being considered and the general ground that the charge had not been proved to the required standard of proof.

[4] The High court (**Ibrahim** & **Ojwang, JJ** (*as they then were)* after reviewing the evidence tendered before the trial court found the appellant had been properly identified and the identification had not been shaken by the appellant's defence. They therefore dismissed the appeal, upheld the conviction and affirmed the death sentence.

[5] Still aggrieved by that decision, he has now moved to this Court on second appeal relying on seven grounds of appeal filed on his behalf on 2nd July, 2018 by **Okoth Duncan Odera advocate**. These grounds raise yet again the issue of identification of the appellant; failure of the learned Judges to re-evaluate and re-analyse the evidence adduced before the trial court; contradictions in the evidence; and the generic ground that the charge was not proved beyond reasonable doubt.

[6] In his submissions in Court, learned counsel Mr. Odera emphasized that the crucial issue in this appeal was the identification of the appellant. He opined that the same was not free from error, particularly because there were serious discrepancies in the evidence of the complainant and that of the only eye witness Njuke Nduta (PW3).

According to learned counsel, neither the complainant nor PW3 had given the appellant's name to the police. It was not therefore clear how he was arrested. Moreover, even though the complainant claimed to have picked out the appellant at an identification parade, the identification parade forms had not been produced in evidence, nor was the officer who had conducted the parade called to testify.

[7] He submitted further that the learned Judges of the High court had failed to re-evaluate the evidence on record and that is why they fell

into error of concluding that the appellant had been properly identified. Counsel also faulted the two courts below for dismissing the defence proferred by the appellant without giving any reasons. He urged us to allow the appeal, but in the event we uphold conviction, then we should interfere with the sentence and reduce the same considering the appellant has been incarcerated for the last 15 years.

[8] On his part, **Mr. Yamina** learned Principal Prosecution Counsel conceded this appeal, purely on the ground of identification. He urged that there was no evidence as to who had given the police the appellant's name to lead to his arrest, as neither the complainant, nor PW3 had given the appellant's name to the Assistant Chief who with the help of some members of public arrested the appellant. He therefore urged us to allow the appeal.

[9] Although the appeal is conceded we would be abdicating our duty if we did not consider the issues raised before us in order to make an informed decision as to whether the appeal was properly conceded or not. We do so while bearing in mind that on second appeal, our remit is restricted to considering only points of law, pursuant to **Section 361(1) Criminal Procedure Code**.

[10] Having considered the record of appeal, the grounds raised by the appellant and the submissions by both counsel, we agree with counsel that the gravamen of this appeal is the issue of identification. Can the identification of the appellant at the scene of the robbery be said to be free from error? This singular issue can in our view dispose of this appeal.

[11] We appreciate that this Court cannot interfere in the findings of fact by the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See **Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009** unreported). We remind ourselves further, as expressed in a litany of our decisions that we must as much as possible defer to the concurrent findings of fact by the two courts below. In **Boniface Kamande & 2 Others vs R [2010] eKLR**, this Court pronounced itself as follows:-

> **"On a second appeal to the Court, ... we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."**

[12] The issue we need to consider now is whether the concurrent finding by the two courts on identification was supported by the evidence adduced by the prosecution. Although the robbery is said to have taken place in broad daylight, nowhere in his evidence does the complainant state that he identified the appellant. He claimed to have picked him out at an identification parade but that evidence was not availed to the court and it did not therefore have any value. Further, PW3 who said he knew the appellant before that date testified that he had not given the appellant's name to the police. How then did whoever arrested the appellant get his name? We note that the learned Judges of the High court did not re-evaluate the evidence pertaining to identification of the appellant to arrive at their own decision. They did not state why they agreed with the trial court that the appellant had been properly identified. These are material factors that the trial court and the High court failed to consider. Had they done so, we are persuaded they could have arrived at a different conclusion on the issue of identification. We are persuaded, like both counsel herein that there was paucity of evidence in the manner in which the appellant was identified.

[13] Our finding is that the identification of the appellant was not foolproof and left doubts which were not resolved and which could have been resolved in favour of the appellant. We are in agreement with counsel herein that the conviction against the appellant was based on very shaky ground and cannot be sustained. The appeal is properly conceded and we consequently allow it and quash the conviction and set aside the death sentence meted against the appellant. We order that he be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 6th day of December, 2018

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

M.K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR