IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 12 OF 2016

BETWEEN

DAVID KIVANDE MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court

of Kenya at Nairobi Chepkwony and Ongeri (JJ)

dated the 29th July 2015)

in

H.C.CR.A. NO. 7 OF 2013)

****

JUDGMENT OF THE COURT

[1] David Kivande Mwangi, *(hereinafter referred to as 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 22nd January, 2012 at about 10:00 pm at Njathaini area Kasarani division within Nairobi county, the appellant jointly with others robbed Japhet Odoyo, *(the complainant),* cash of KShs. 60, a mobile phone, a silver necklace and steel ring all valued at Kshs. 12,360/= and that immediately before or immediately after the time of such robbery wounded the complainant. The appellant was convicted and sentenced to life imprisonment by the trial court.

[2] The appellant aggrieved by that judgment preferred an appeal against it to the High Court. The High Court, *(Chepkwony & Ongeri, JJ.*), after hearing the appeal dismissed it and following an application by the prosecution the appellant's sentence was enhanced to death. The appellant, being dissatisfied with that judgment of the High Court, brought this appeal now before us.

[3] This being a second appeal, our mandate is provided under ***Section 361*** of the ***Criminal Procedure Code,*** as follows:

"361 (1) A party to an appeal from a subordinate court may, subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section: -

(a) ***on a matter of fact, and severity of sentence is a matter of fact; or***

(b) ***against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence".***

This Court has pronounced itself on the provision aforesaid in a host of cases including ***Hamisi Mbela & Another -v- Republic - [Mombasa Court of Appeal Criminal Appeal No. 319 of 2009] (UR),*** in which the Court expressed itself as follows:

"This being a second appeal, this Court is mandated under section 361 (1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu v Republic [1983] KLR 445, 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 courts and resist the temptation to treat findings of fact as holdings of law or mixed findings 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 that conclusion, which would be the same as holding that the decision is bad in law. (Martin -v- Glyneed Distributors Ltd. t/a MBS Fastenings)".

[4] Briefly the facts of this case are that, on the 22nd January 2012 the complainant (PW1) while walking home was accosted by two men, one wielding a metal bar and the other a piece of wood. The complainant made an attempt to run and was hit with the metal bar on the head. The attackers ran after him and upon catching up with him hit him on his legs, hands, back and around the waist. The attackers also robbed him of cash of Kshs. 60/= in coins, a Nokia mobile phone, a silver necklace and a steel ring.

[5] According to the testimony of the complainant, he recognized his attackers and one of them was nicknamed Gaddafi. After the attack the complainant went home where he narrated to his brother, Benard Opiyo, (PW3) that he been attacked by the appellant. PW3 took him to Kiambu District Hospital where he was treated and discharged. PW1 reported the matter at Kiamumbi Police Station where he was issued with a P3 form that was filled by one Dr. Faizal who classified the probable weapon used to attack PW1 as blunt and the degree of injury as harm.

[6] According to the complainant and his brother, Benard Opiyo, they went back to the scene of attack and recovered the metal bar used to attack the complainant which still had blood stains on it, as well as a hat that apparently had been worn by the appellant during the attack. They took these items back to the police station. Later the complainant and his brother together with members of the public went to the appellant's house where they arrested the appellant and took him to police station.

[7] The prosecution also called Richard Austine Ouma, (PW2), who testified that his work involved repairing of mobile phones. He gave evidence that on the 26th January 2012 while at his place of work a man brought him a mobile phone that he wanted repaired. According to Richard, he recognized the phone as that belonging to the complainant which he had charged for the complainant on several occasions. Richard testified further that he was aware that the complainant had been attacked and robbed of his phone and that upon inquiring from the man where he got the phone, the man said that someone had sold it to him. Richard then called the complainant and they took the man to the police station where he identified the appellant, who had been arrested earlier, as the person who had sold the phone to him. The man found with the phone was arrested and later released after recording a statement but he could not be traced to testify during hearing of the case.

[8] In his defence the appellant gave an unsworn statement and stated that on the 25th January 2012, as he was walking home he was accosted by three drunken boys and after an altercation they went to the police station to resolve the matter. According to the appellant, at the police station he was placed in the cells and later taken to his house where a search was conducted. The appellant further stated that the

investigating officer asked him for a bribe and told him that there was evidence that could be used to fabricate charges against him.

[9] When the matter came up for hearing of the appeal before us, learned counsel Mr. Amutallah Robert appeared for the appellant. Learned counsel informed us that he was abandoning the memorandum of appeal filed by the appellant and would rely on the supplementary memorandum of appeal filed on the 9th June 2017, which listed the following grounds of appeal:

> ***"a) That the learned trial judges faulted in points of law by failing to note that there was no proper identification of the appellant.***
>
> *b)* ***That the learned trial judges faulted in points of law by failing to note that the trial court convicted the appellant while relying on the testimony of PW1.***
>
> *c)* ***That the learned trial judges erred in law by failing to properly re-evaluate and re-analyse the entire evidence on record as duty bound.***
>
> *d)* ***That the learned trial judges grossly erred in law by concluding that the prosecution case was proved beyond reasonable doubt, failing to note that the same remained unproved as required in law."***

[10] In his oral submissions before us, learned counsel merged grounds 1 and 2 and 3 and 4 and respectively argued them together. On the issue of identification, counsel submitted that the identification took place at 10.00 pm and that though PW1 in his evidence said that there were security lights, he did not say the source and how close he was to them. Counsel further submitted that PW5 in his evidence said that there were flashlights but PW1 did not say so. Counsel contended that PW1 said that the appellant had a hat and therefore learned counsel asked this Court to take judicial notice that with a hat it was difficult to properly identify the appellant.

[11] Counsel further contended that PW5 stated that the appellant was presented to the Police Station after 2-3 days; counsel argued that the complainant ought to have moved immediately if at all he had seen the appellant. Counsel further argued that PW1 in his statement did not give a description of the appellant and that the only thing he knew was the name Gaddafi. Counsel relied on the case of ***Francis Muchiri Joseph v Republic [2014] eKLR*** and submitted that failure to mention the name of a known assailant in the statement is fatal.

[12] On the 3rd and 4th grounds, counsel submitted that another person was found with the mobile phone but he was not charged or produced as a witness for the prosecution. Counsel argued that it was hearsay that that person took the phone to PW2 who alerted the complainant. Counsel further argued that was a failure to call a material witness which is fatal.

[13] Counsel submitted that the High Court failed to evaluate the issue of recovery and that the charge was not proved beyond reasonable doubt. In conclusion, counsel contended that no evidence was led to show that the appellant was known as Gaddafi.

[14] The Assistant Director of Public Prosecutions, Mr. Wanyonyi, appeared for the prosecution and opposed the appeal. He submitted that PW1 knew the appellant for 6 months. Counsel submitted that the evidence of PW1 and PW5 showed that the road was well lit and that it was easy to identify the appellant, whom he knew and was in close proximity with.

[15] Counsel contended that the High Court re-evaluated the evidence and made its own conclusion that this was a case of recognition. Counsel further contended that PW2 corroborated PW1 and that it was not necessary to produce the person who gave PW2 the phone.

[16] We have duly perused the record of appeal. We have also considered the respective submissions of learned counsel as well as the authorities cited.

[17] As we have stated above this being a second appeal we are enjoined to consider only issues of law. We are of the view that only two issues fall for our consideration in this appeal. The first is the issue of identification of the appellant by PW1 through recognition; secondly, is whether the evidence of PW1 on identification was sufficient to secure conviction of the appellant.

[18] The issue of identification of the appellant by PW1 through recognition goes to the heart of this appeal and indeed is the crux of this appeal. This Court in the case of ***Wamunga –vs- R, [1989] KLR 424*** whilst dealing with the issue of identification stated as follows:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".***

In ***Shalen Shakimba Ole Betui & Shadrack Koitimet Ole Betui V R, CR.A No. 284 of 2005*** this Court stated as follows:

> ***"The present was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified, nay recognized by PW1 and PW2. There could be no possibility of a mistaken identify. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, Anjononi and Another v. R, [1980] KLR 54 at p. 60".***

[19] The trial Court faced with the issue of identification/recognition of the appellant rendered itself thus:

> ***"The complainant is on record saying he knew the accused person by a nickname Gaddafi. On the material night he easily recognized him with the help of security lights which had illuminated the scene. PW5 the investigating officer called it "Mulika Mwizi" floodlights. Ordinarily such lights are sufficient in intensity. Further, there must have been close proximity between him and the suspects as they attacked him, with the metal bar and piece of wood. They followed him and roughened him up again before they robbed him of the phone and jewellery hence they interacted for a considerably long period of time. He said that when he made a report to the police he said he could identify the culprits and this was confirmed by the investigating officer. He later arrested the accused with the help of members of the public and handed him over to the police. I am satisfied that though he was identified by a single witness, the evidence of identification was free from error".***

[20] On its part the High Court had this to say on the issue of recognition:

> ***"On the issue of identification of the appellant, we find that this was a case of recognition and that the complainant was in close proximity with to appellant and he was properly identified. The complainant knew the appellant by a nickname (Gaddafi)".***

[21] PW1 on the other hand said as follows in his evidence before the trial court:

> ***"…when I was almost home I met 2 men. I thought they were just on their way. There were security lights in the place. I saw their faces. They were known to me by facial appearance and one also by nickname of Gadaffi. As we were passing each other Gaddafi got out a metal bar and the other got out a piece of wood. The one with the piece of wood hit me with wood on my forehead. As I tried to run away Gaddafi hit me with the metal bar. I managed to run away. .....they caught up with me. The two thugs hit me on my legs, hands, back and around the waist. Then they started asking me "iko wapi pesa" ….they took away my Nokia Mobile phone….the thugs also took a steel ring and silver necklace which I was wearing. My middle finger of the right hand was cut as they tried to pry the ring from it".***

[22] We agree with the conclusion by the two courts below and especially the analysis and conclusion by the trial Court. The above events as stated by PW1 clearly demonstrate that he recognized the appellant whom he knew by the nickname Gaddafi. It is also evident from the evidence of PW1 that there was close proximity between him and the assailants. The assailants used a metal bar and a piece of wood to assault him and obviously close proximity is essential for that to take place. When he managed to escape the assailants followed and assaulted him further before robbing him, PW1 therefore spent considerable amount of time with his assailants. PW1 also stated that that the area was well lit which information he relayed to P.C. Silas Nikunu (PW5) who stated:

> ***"He said there were flashlights known as "Mulika Mwizi" which illuminated the scene and he was able to recognize the suspect".***

We therefore find that the circumstances of identification were favourable and free from the possibility of error.

[23] The appellant also raised the issue that he was convicted on reliance of testimony of a single witness, PW1.

In ***Kiilu & Another V. Republic, [2005] 1 KLR 174*** this Court held:

> *"**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".***

In the case of ***Maitanyi versus Republic [1986] KLR 198*** this Court held *inter alia* that:

> *(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 condition 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 in description.***
>
> *(3) **The Court must warn itself of the danger of relying on the evidence of a single identification 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 decisions is made.***
>
> *(4) **Failure to undertake an inquiry of correct testing is an error of law and such evidence cannot safely support a conviction.***

Section 143 of the ***Evidence Act Cap 80 Laws of Kenya*** provides:

> "***No number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact".***

[24] From the authorities cited above as well as Statute, it is clear that an accused person can rightly be convicted on the evidence of a single witness on identification. However, before a court convicts an accused person on the strength of evidence from a single witness, the court must warn itself of the danger of relying on the evidence of a single identification witness.

[25] The trial court faced with the issue of a single witness on identification rendered itself thus:

> ***"In the circumstances the only evidence linking the accused with the offence is that of identification by a single witness. Even though the complainant said he recognized the accused person, the offence having been committed at night calls for a warning that the accused person shall only be convicted if the evidence is absolutely watertight".***

The trial court, therefore, rightly warned itself of the danger of relying on the evidence of PW1 on identification of the appellant, bearing in mind that the offence took place at night. The trial court then, as noted in the earlier quoted excerpt, considered the issue of the lighting and concluded that the light was sufficient in intensity.

[26] On this issue the High Court stated, and rightly so we must add, that there is no legal requirement as to number of witness required to prove a case. The learned Judges followed this Court's decision in ***Abdullah Bin Wendo Vs. Rex 20 EACA 166***, which held that circumstantial evidence can be used by a Judge to arrive at a concussion that the evidence of identification though based on the testimony of a single witness can safely be accepted as free from the possibility of error. The learned Judges went on to state thus:

> ***"We find that the evidence of PW2 who recovered the mobile phone belonging to the complainant though circumstantial corroborates the testimony of the complainant. PW2 said he recovered the phone from a customer who said the phone was sold to him by the Appellant".***

[27] We wholly agree with the analysis and conclusion of the two courts below on the issue of a single witness. Accordingly, it is our finding that the appellant was rightly convicted on the evidence of PW1 on recognition.

[28] Having made this finding, we are satisfied that the appellant was properly convicted of the offence of robbery with violence contrary to ***Section 296*** of the ***Penal Code*****.** This appeal is therefore bereft of merit and the same is accordingly hereby dismissed, as we so order.

Dated and delivered at Nairobi this 28th day of July, 2017

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.