IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CRIMINAL APPEAL NO. 173 OF 2012

BETWEEN

GABO ABDI SONGOLO....................................APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa

(Kasango & Tuiyott, JJ.) dated 29th November, 2011

in

H.C.Cr.A. No. 195 of 2009)

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JUDGMENT OF THE COURT

While grazing his cattle together with those of his friends at Maungu Ranch on 3rd July 2007 in the morning, the complainant was approached by three men of Somali origin who purported to be looking for their lost cattle. Of the three the complainant recognized one who he maintained was the appellant while the other two were strangers to him. The third person ordered the complainant to sit down as he demanded to be shown where their lost cattle were. He grabbed a panga from the latter as the appellant forced the complainant to sit down. The three men then attacked him on the head and neck with sticks and panga until he lost consciousness. When he came to he noticed the 9 heads of cattle were missing. He tied his shirt around his neck to prevent loss of blood from the injuries inflicted around the neck. With great difficulty and pain he walked home where he found his wife, son PW3, **Francis Nzenge Malonza** and brother-in-law, PW2 – **Victor Mutua** who he informed of the attack, explaining that one of those who attacked him was the appellant.

After being taken to the hospital where he was admitted for treatment for two weeks, the police began investigations which culminated in the recovery of the cattle, some alive and others already slaughtered at a butchery belonging to one **Adam Haji** in Voi town. It was this Adam Haji who approached **Julius Mbinga Musembi** (PW4) a fellow butchery owner at Voi, to buy some of the cattle that were being sold by some people. Those people were later identified as the appellant and his two co-accused persons. They ultimately met, negotiated the total price of all the cattle at Kshs.114,000/- and using a hired pick-up

vehicle from **Benson Mwajala** (PW5) the cattle were transported to Adam Haji's butchery. PW5 identified the appellant and the two co-accused persons as the sellers and Adam Haji as the buyer. The three were charged before the Senior Resident Magistrate's Court at Voi in Criminal Case No. 739 of 2007 with robbery with violence contrary to **section 296(2)** of the Penal Code. The prosecution's case was closed without the evidence of Adam Haji.

In their respective unsworn evidence the appellant and his co-accused denied involvement in the crime or knowledge of the complainant; and that they were at the scene of crime.

The learned trial magistrate was however persuaded that all the accused persons before her committed the offence with which they were charged and rejected the defence proffered by the appellant and his co-accused. The learned trial magistrate concluded her judgment saying:-

> ***"The evidence against the 1st accused here was that the Complainant here said he recognized him as he had been seeing him at Maungu ranch herding cattle for almost 2 years. He even knew his name as Mohamed Songolo. Julius Mbinga Masinde PW4 told the Court that he was introduced to the 1st accused here by one Adam who said that he was selling cattle. Julius therefore bought the cattle from the 1st accused here. The complainant identified the 2nd and 3rd accused here as the people who, together with the 1st accused robbed him off his cattle violently. Julius PW4 said that the 1st accused was with the 2nd and 3rd accused persons when he bought the cattle. The 1st accused here told him that the 2nd and 3rd accused were not herders. After the arrest of Adam and the transporter Benson PW5, Adam led them (police officers) to the arrest of the 2nd and 3rd accused. From the above summaries I do not believe the 1st accused's defence that the 2nd accused, 3rd accused and the complainant were strangers to him".*** (sic)

On the failure by the prosecution to avail Adam Haji, the investigating and the arresting officers, the learned magistrate expressed this opinion;

> ***"I must comment that crucial witnesses in this case, namely Adam, the arresting officer and investigating officer never testified. These 3 witnesses would definitely have shade (sic) more light on the circumstances of the case. My conclusion is that the 1st accused was properly identified by recognition by the complainant here. After the arrest of the 2nd and 3rd accused, the police should have conducted an identification parade. Could it be that none was conducted as the complainant was still in hospital nursing serious injuries as he testified that he was admitted in hospital for 2 weeks? However, be that as it may, the evidence of especially Julius PW4 properly incriminates the 2nd and 3rd accused person here as being accomplices to 1st accused. Julius testimony gave weight to the dock identification of the 2nd and 3rd accused here by the complainant which would not have been convincing on its own."***

With that and upon conviction the trial court sentenced the three to death.

The three being aggrieved, moved to the High Court where they filed separate appeals which were subsequently consolidated and heard in **Mombasa High Court Criminal Appeal No. 195 of 2009**. In their judgment the learned Judges (Kasango and Tuiyott, JJ.) agreed with the trial court as to the issue of identification holding that the appellant was known to the complainant, the robbery took place at 9.00 a.m. – in broad day light; the robbers engaged the appellant in a conversation in close proximity before attacking him, the stolen animals were recovered the next morning in the possession of the appellant and the other two suspects, and the complainant supplied the appellant's name at the first opportunity.

The learned Judges however overruled the trial court with the regard to the conviction of the appellant's accomplices. They said:

> ***"We have to agree with the 2nd and 3rd Appellants that dock identification alone is worth little.***

The Court of Appeal said as much in <u>Fredrick Ajode</u> –vs- <u>Republic</u> Criminal Appeal No. 87 of 2004 when it held that;

'It is trite law that dock identification is generally worthless and the Court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.'

On analysis the evidence against the 2nd and 3rd appellants is as follows:-

(a) PW1 was attacked by three people one of whom he recognized (1st Appellant) and who stole nine cows from him.

(b) PW4 bought nine cows from the 1st, 2nd and 3rd appellants.

(c) Six of the nine cows were identified by PW3 as Belonging to PWI.

There is evidence that the 2nd and 3rd appellants were involved in selling cows to PW4 but there is little evidence that the duo participated in the robbery".

The Judges did not think that the failure to call the three witnesses was fatal, because, in their view, the prosecution exercised its discretion properly in calling the witnesses who testified and that it made several genuine attempts to procure the attendance of the other three without success; and that the failure, particularly to call Adam Haji was partly the reason for their finding that there was no evidence linking the 2nd and 3rd appellants with the crime. They cited **<u>Jeremiah Gathuku Kirungi</u> v <u>R</u>**, Criminal Appeal No. 73 of 2008 for the proposition that failure to call police officers involved in a criminal trial, including investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrates. They consequently concluded that failure to call the investigating officer and the arresting officer did not weaken the overwhelming evidence against the appellant. Being satisfied that the evidence against the 2nd and 3rd appellants did not link them to the crime, the learned Judges allowed their appeal, quashed the conviction and set them free.

The appellant's conviction and death sentence was however confirmed thereby provoking this appeal, which was argued broadly as follows. First **Mr. Adalla,** learned counsel for the appellant faulted the learned Judges for failing to re-evaluate the evidence on record arguing that they merely re-stated the evidence as recorded by the trial magistrate; that the learned Judges ought to have particularly re-evaluated the evidence of identification by recognition; that had they done so it would have been clear to them that the complainant did not recognize his attackers; that the learned Judges casually treated the evidence of identification and erroneously dismissed the need for an identification parade as unnecessary; that if indeed the complainant knew the appellant, why did he not tell his son so at first encounter; that the name he allegedly gave to the other witnesses, Mohamed Songolo, was not the appellant's name; that the appellant's true name was Gabo Abdi Songolo; that the learned Judges also fell in error by holding that failure to call the three critical witnesses did not occasion a miscarriage of justice; and also that it was not fatal to the prosecution's case. Learned counsel finally submitted that the three suspects presented and relied on consolidated grounds in their first appeal and it was therefore erroneous for the learned Judges to have failed to acquit the appellant along with his co-appellants.

On these grounds we have been invited by the appellant to apply **section 361** of Criminal Procedure Code and find that the High Court erred in law in dismissing the appellant's first appeal; and further that no court properly directing itself on the facts of the case and the law would have come to the finding that the appellant was involved in the commission of the offence charged.

Mr. Wamotsa, learned Senior Prosecution Counsel appearing for the respondent argued in support of the decision of the High Court and submitted that no purpose was to be served by conducting a police identification parade as the appellant was well known to the complainant prior to the robbery; that the variance in the true name of the appellant and the name given to PW2 was not material; that what was important was the fact that the appellant was known to the complainant; that the appellant suffered no

prejudice by the failure to call Adam Haji, the investigating officer or even the arresting officer.

The role of this Court on second appeal has been explained in **M'Riungu**v **R** [1983] KLR 455, and in several other decisions. It is restricted to questions of law. This appeal, we are satisfied on the basis of the above grounds of appeal, raises questions of law.

The two courts below made concurrent factual finding that the complainant was robbed of his 9 heads of cattle on the morning of 3rd July, 2007; that three armed suspects were involved; and that they inflicted severe injuries on the complainant in the course of the robbery. Although the appellant has challenged his conviction on five grounds, and even though Mr. Adalla condensed and argued those grounds in three clusters, in our view only two issues fall for our determination. The first challenge regards identification of the appellant.

The appellant has argued that the learned Judges did not re-evaluate and analyse the evidence before upholding the decision of the trial court, and that there was no proper basis for the first appellate court to uphold the evidence of identification of the appellant.

The duty of a first appellate court was firmly defined in the case of **Okeno** v **R** [1972] EA 32 in the following words:-

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and to itself come come to its own conclusion on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

The learned Judges of the High Court appreciated this role and correctly directed themselves this way;

> ***" We sit as a first appeal court in this matter. A first appeal is in nature of a retrial. We are enjoined to consider the evidence tendered before the trial court, re-evaluate it and reach our own conclusion. We must nevertheless bear in mind that, unlike the trial court, we do not have the advantage of hearing and seeing the witnesses."***

The learned Judges, faithful to this duty, assiduously analysed the evidence of identification bearing in mind the time the offence was committed, the fact that there was conversation between the complainant and the robbers; that the appellant had been known to the complainant for some two years before the incident, and concluded that the evidence of recognition was strong.

The learned Judges, further closely re-evaluated the evidence of recovery of the stolen livestock and found a nexus between the appellant and the stolen livestock.

We find in the end, that the learned Judges performed their duty of evaluating the evidence on the basis of the law and arrived at their own independent decision. On our own assessment of the law we reiterate the importance of accurate and correct identification in a criminal trial. Because of the problems associated with mistaken identification, the English Court of Appeal in the famous case of **R** v **Turnbull & others** [1976] 3 ALL ER 549 laid down important guidelines for trial Judges to apply in disputed identification evidence. Where the case against the accused depends wholly or substantially on the correctness of identification of the accused person, which the accused himself alleges to be mistaken, it is imperative for the trial court to warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification. It is imperative for the trial court to examine closely the circumstances in which the identification by each witness was made by considering matters like, the length of time the witness observed the suspect, the distance between them, and whether the witness had seen the suspect before.

Turnbull also emphasized the commonly accepted principle that recognition is more reliable than identification of a stranger; that where identification of a person is by recognition, caution must still be exercised because mistakes in recognition of close relatives and friends are sometimes made. See also **Maitanyi**v **R** [1986] KLR 198. These principles apply more to cases of a single identifying witness and in situations where positive identification is clearly difficult.

The complainant was categorical that he recognized the appellant, whom he had known "*for almost 2 years.*" He knew him as Mohamed Songolo. The robbers first inquired from the complainant about their lost cattle. That encounter, according to the complainant lasted 3 minutes and the robbers went away. They returned and this second encounter lasted even longer. The robbers physically forced the complainant to sit down with the appellant holding him by the shoulder and pushing him down as they did so, demanded to be told where their cattle were. They held his head down as they assaulted him with sticks on the head before cutting him on the neck with a panga.

This incident taking place in the morning in an area where the appellant, his confederates and the complainant were the only people, presented an opportunity to the latter to clearly see and identify the robbers. He was forthright and the trial magistrate, who heard and saw him found that he was clear in his testimony that of the three robbers, only the appellant was known to him prior to that date, while the other two were strangers; and that even then he had sufficient time with them to be able also to identify the other two men. This latter finding was, of course rejected by the High Court and is not before us.

In addition, the complainant told PW2, Victor Mutua Mwinzi at the earliest possible opportunity that he recognized the appellant. The following day the appellant was negotiating the sale of the complainant's cattle with butchers. The cattle were positively identified by the complainant from the marks, LMK, MK and J.M on the thighs of the cattle. Although the two courts below did not specifically find that this was evidence of recent possession, they found nonetheless that it re-enforced the evidence of identification confirming the appellant's involvement in the robbery.

It is trite law that before a court can rely on the doctrine of recent possession as a basis for conviction, the possession must be positively proved as was done here by the prosecution. The appellant was found in possession of the stolen cattle the next day. See **Isaac Ng'ang'a Kahig'a** *alias* **Peter Ng'ang'a Kahig'a v R.** Criminal Appeal No. 272 of 2005.

Regarding the failure to call some witnesses, our view is that that question was sufficiently explained. The failure to call the three witnesses has not been shown to have occasioned a miscarriage of justice or prejudice to the appellant. The evidence presented was itself sufficient to prove the offence charged. In the result the two grounds raised in this appeal must fail. Accordingly we find no merit in this appeal. It is dismissed in its entirety.

Dated and delivered at Mombasa this 26th day of February, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR