IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 48 OF 2015

BETWEEN

BAKARI RASHID Alias **BEKA…..……..…..….APPELLANT**

AND

REPUBLIC…….....…RESPONDENT

(Being an appeal from the Judgment of the High of Court of Kenya at Mombasa (Odero & Muya, JJ.) dated 28th July, 2014

in

H.C.CRA. No. 32 of 2011)

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JUDGMENT OF THE COURT

Mr. Bakari Rashid *alias* **Beka** "*the appellant*" shall forever curse and or regret the day he sauntered in a bar in the company of **Ken** and **Otile**, his pals for drinks. It was the beginning of his tribulations and brush with the law. They had drinks and as the drinks began to have their toll a shouting match ensued amongst them. Apparently, the trio had participated in a robbery at Majengo Mapya a week earlier. The appellant and Otile accused Ken of short changing them by taking a bigger share of the proceeds. Unknown to the trio, there was an informant in the bar who keenly listened to the exchanges. The informant duly passed on the information to **Sergeant Samuel Awuor** (*PW4)* of Likoni Police Station. PW4 knew the trio very well. Indeed Ken was being looked for by him and other police officers in connection with another robbery incident.

In the meantime on 20th August, 2009, whilst at the police station, PW4 had received a report of a robbery incident at Caltex Harambee area, Likoni Location of Mombasa District from **David Kamau Njuguna** (*PW3*) and **Beatrice Nyiva Mulandi** (*PW2*). According to the report PW2, was with her sister, **Rose Muthei Mulandi** (*PW1*) at about 10 a.m. in PW3's house, an uncle, when some three men came knocking on the door that was ajar. PW2 went to the door and invited them in. Once inside, they immediately demanded to know the whereabouts of the lady of the house, that is the wife of PW3. On

being told that she had gone out to run some errands, the three men suddenly pulled out a pistol and a metal rod. They grabbed the two ladies and tied them up as they demanded the keys to the bedroom. With the keys not forthcoming, the three men using the metal rod forced open the bedroom door and proceeded to a suitcase which they ripped open and therefrom took Kshs.680,000/- kept therein by PW3, being proceeds from his transport business due for banking later in the day. Satisfied with their heist, the three men left but not before forcefully taking PW1's mobile phone. After they left, PW2 and PW3 called for help from the neighbours. A neighbor by the name **Christine** responded and untied them. She then called PW3 who was at work and informed him of the robbery. PW3 rushed home and found his bedroom door ajar and his bedroom ransacked. His money was also missing. It was then that he proceeded to Likoni Police Station in the company of PW2 and reported the incident.

As already stated, PW4 knew the alleged culprits very well. Based on what the informer told him and the report by PW2 and PW3, he in the company of other police officers, went looking for them in their hideouts. In the process, PW4 established that Ken had escaped and or relocated to Kisumu. They raided the appellant's two houses on 31st August, 2009 and arrested him from his second wife's house. The record does not disclose what became of Otile. However, following the arrest PW4 requested that the appellant be subjected to a police identification parade. On 4th September, 2009, **Inspector James Tima**, (*PW5*) conducted the identification parade at Likoni Police Station. The identifying witnesses were PW1 and PW2. Whereas PW1 was unable to pick out the appellant on the identification parade, PW2 successfully did so. She was assisted in doing so because of the appellant's swollen mouth. According to her, he was the one wielding the pistol during the incident. She also claimed to have seen him clearly during the robbery as it was in broad daylight. Thereafter , PW4 preferred against the appellant a single charge of robbery with violence contrary to **Section 296(2)** of the Penal Code in the Chief Magistrate's Court at Mombasa, particulars being that the appellant on 20th August, 2009 at Caltex Harambee Area of Likoni Location of Mombasa District, jointly with others not before court whilst armed with dangerous weapons namely metal bars, robbed **Rose Mutheni** cash Kshs.680,000/- and one mobile phone make Vodafone all valued at Kshs.681,500/- and at or immediately before or after the time of such robbery threatened to use actual violence on the said Rose Mutheni.

The appellant denied the charge and in his unsworn statement of defence claimed that he was asleep in his house on 31st September, 2009 when two people accosted him and told him that they were looking for one Bakari. When he informed them that he was also known as Bakari, they searched his house and finding nothing, arrested and took him to Likoni Police Station. He was thereafter interrogated over an offence he knew nothing about. Four days later, he was subjected to a police identification parade where two women were witnesses. Whereas one identified him the other could not. His defence was that he knew nothing regarding the charge.

The learned trial magistrate accepted the prosecution evidence, and rejected the defence thereby convicting the appellant. Upon conviction, the appellant was sentenced to death. The appellant's appeal against conviction and sentence to the High Court was rejected by that court hence this appeal.

The appellant filed his own grounds of appeal. Prior to the hearing of the appeal, however, the court appointed **Mr. Joseph Gathuku Esq**, learned counsel to represent him. He proceeded to file supplementary grounds of appeal to wit; that the conviction was based on contradictory evidence; that the evidence led was at variance with the particulars in the charge sheet; that crucial witnesses who would have corroborated the prosecution evidence on the violent robbery were never called; that the evidence of identification was unsupported, uncorroborated and unreliable; and lastly that the High Court did not re-evaluate the evidence afresh so as to reach its own independent finding.

At the hearing, **Mr. Gathuku** argued his supplementary grounds of appeal. Counsel dwelt at length on the alleged contradictions in the prosecution's case to drive home the point that the evidence was thus unreliable and the resultant conviction was equally suspect. Further, that had the 1st appellate court performed its duty of re-evaluating the evidence as required, it could not have sustained the conviction. The contradictions alluded to were the amounts of money indicated in the charge sheet as having been stolen and the evidence led in that regard, that the complainant did not testify as to ever having lost

Kshs.681,500/- nor did she testify as to owning a mobile phone that was stolen during the robbery, the charge sheet similarly did not mention a pistol yet PW1 and PW2 testified as having seen it in the possession of the robbers during the robbery, and finally that the briefcase from which the robbers took the money was not tendered in evidence.

Counsel further submitted that only PW1 and PW2 were the eye witnesses to the robbery. However, there was a mention of a Christine who came to their rescue following the robbery by untying their hands as well as calling PW3. The said Christine was not called as a witness. Similarly, there were other witnesses whom he deemed crucial who were not called. Counsel took the view that had these witnesses testified it was possible that their evidence would have been adverse to the prosecution case with attendant consequences. For this proposition, counsel relied on the case of **Daniel Kuria v Republic [2011] eKLR**.

On identification, counsel submitted that the evidence was not properly evaluated. Though PW1 and PW2 were the victims of the attack and though it was in broad daylight, when called to the identification parade, PW1 was not able to pick out the appellant. Though PW2 claimed that she was able to identify the appellant on the identification parade courtesy of his swollen mouth, she did not in her evidence in chief allude to that fact. Finally, counsel submitted that the appellant was arrested on the basis of hearsay evidence as it was on the basis of a shouting match in a bar. That evidence could not be used to sustain a conviction. He accordingly called upon us to allow the appeal, quash the conviction and set aside the sentence.

Opposing the appeal, **Mr. Yamina**, learned Principal Prosecution Counsel submitted that though there were contradictions in the prosecution's case, nonetheless the appellant was not prejudiced and that in any event those contradictions were curable by dint of **Section 382** of the Criminal Procedure Code. On failure to call other witnesses, counsel submitted that the said witnesses were not present during the robbery and thus did not witness the robbery. Their evidence would thus have been immaterial and that the evidence on record was sufficient to sustain a conviction.

On identification, counsel submitted that PW2 had better opportunity to identify the appellant as she was the one who was accosted and addressed first. On re-evaluation of the evidence, counsel was satisfied that this task was successfully executed by the first appellate court since it summarized the findings of the trial court. He therefore urged us to dismiss the appeal in its entirety.

This is a second appeal and therefore only issues of law fall for consideration. In our view, only three issues of law fall for our determination going by the submissions of respective counsel. These are, failure by the first appellate court to re-appraise and re-evaluate the evidence tendered in the trial court so as to reach its own conclusions as required, identification of the appellant and failure to call vital witnesses.

On a first appeal from a conviction, an appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its decision thereon. As the first appellate court, the High Court has a duty to rehear and reconsider the material evidence before the trial court. It must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See **Pandya v Republic [1957] EA 336, Ruwala v R [1957] EA 570** and **Okeno v Republic [1972] EA 32**.

At the risk of repetition, but for the sake of clarity, this Court put it this way in the recent case of **Joseph Njuguna Mwaura & 2 others** :-

> **"….The duty of the first appellate court was to analyse and re-evaluate the evidence which was before the trial court and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court and could warrant interference by the Court of Appeal. There were instances where the first appellate court could depending on the facts and circumstances of the case come to the same conclusions as those of the lower court. It**

could rehash those conclusions and there was nothing objectionable in doing so, provided it was clear that the court had considered the evidence (on the basis of the law and the evidence) to satisfy itself on the correctness of the decision…"

It must also be appreciated that there is no set format for the re-appraisal of the evidence by the first appellate court. However, it must be self evident from the record that the court undertook such an exercise. It is not sufficient to merely summarize the evidence on record and leave it at that. The record must show after such summary that the court delved into the re-evaluation, re-consideration, re-analysis and or re-appraisal of such evidence. Failure to perform this vital and statutory task turns it into a question of law thereby conferring jurisdiction on this Court to entertain the complaint.

In this case, the appellant's contention is that there were far too many contradictions and inconsistencies in the prosecution case such that, had the first appellate court performed its duty as expected, it would have come to the conclusion that the evidence adduced was tenuous and could not sustain the conviction. Besides the contradictions, there was also the element of the evidence led being at variance with the offence charged. The appellant raises these concerns in support of his contention that the first appellate court did not perform its statutory duty and not as the State seemed to argue that, it had to do with the probative value to be attached to it. That is why the State argued that they were minor, did not go to the root of the prosecution and which were in any event curable by **Section 382** of the Criminal Procedure Code. This complaint in our view has tremendous merit.

In the charge sheet, the complainant is said to be PW1, yet the evidence on record points to PW3 as the owner of the house and the money stolen therefrom. Nowhere does PW1 claim that the money was hers. Secondly, in the evidence of both PW1 and PW2, besides the metal bars, the robbers were also armed with a pistol. The pistol is nowhere mentioned in the charge sheet. Again, these witnesses talked of the suitcase wherein the money was stolen from as having been brazenly forced open by the robbers and yet it was not tendered in evidence. During the robbery, both PW1 and PW2 were in the house and saw the appellant and his cohorts. Yet, during the identification parade only PW2 managed to point out the appellant. PW1 could not yet she is the one who was robbed. The robbers were allegedly not disguised at all. The encounter lasted about 30 minutes and they were in close proximity. The identification parade was conducted soon thereafter. That the appellant was arrested on the basis of an informer who overheard an exchange over a robbery allegedly committed by the appellant and his cohorts at Majengo Mapya. However, no effort was made to connect the robbery in this case with that at Majengo Mapya if at all. Is Majengo Mapya one and the same place as Caltex Harambee? After all the charge sheet does not at all mention Majengo Mapya. There was no such nexus. Is it possible that the robbery that the trio were talking about could have been totally different one and unconnected to the robbery in this case? Further, out of the three, only the appellant was arrested, why?

According to PW4, he knew all the three and was infact looking for Ken in connection with another robbery. During the ambush, he came by information that Otile had fled to Kisumu. If indeed it was true that Otile had fled, how was it that they could not pursue him to Kisumu and have him arrested? Can a person who has committed an offence in one part of Kenya be allowed to go scot free merely because he has relocated to another part of the country? How about Ken? What became of him? Then there was the evidence of how PW2 identified the appellant on the identification parade. She mentioned that the appellant's swollen mouth gave him away, yet nowhere in her evidence did she allude to such fact, nor did she mention such fact to either PW3 and PW4 when she reported the robbery. To the appellant all these required the first appellate court's consideration and answers. This could only have come through by the first appellate court properly performing its task of subjecting the evidence in the trial court to fresh and exhaustive re-appraisal. We think that the High Court did not deliver itself very well on this aspect. As it is and as correctly observed by the appellant, the High Court merely summarized the evidence as tendered without subjecting it to any thorough re-appraisal. Indeed, issues such as defects in the charge sheet regarding who the complainant was, the ownership of the property stolen as well as the gaps in the prosecution's case alluded to above could easily be explained away and may be curable by **Section 382** of the Criminal Procedure Code. However, that is not the appellant's complaint. The complaint is that the first appellate court did not as much ponder over them and reach a decision thereon. It thus missed the opportunity to re-appraise the evidence and ended up sweeping those concerns under

the carpet.

The crux of this appeal however, revolves around the identification evidence, specifically by PW2. The trial court indeed disregarded the identification evidence adduced by PW1 on the basis that it was dock identification and therefore worthless. Of course a conviction as in this case resting entirely on identification by a single witness should cause concern. The offence may well have been committed in broad daylight but it is still possible for a witness in those circumstances to be mistaken in identifying the perpetrators depending on the conditions obtaining. So that a court acting on such evidence to found a conviction must proceed with caution and circumspection. See **Roria v Republic [1967] EA 583** and **R v Turnbull [1976] 3 ALL ER 54**.

In convicting the appellant the trial court observed:-

> **"……I know the dangers of convicting a person on the evidence of a single witness in identification and I have warned myself already, but the circumstances in this case and especially the evidence of PW2 that she saw the accused doing the robbery and that she identified him at the parade carries some weight of truth…."**

As already stated elsewhere in this judgment, the basis for PW2 picking out the appellant from the identification parade was his swollen mouth. However, the first report she gave to PW3 and PW4 regarding the robbery and her purported identification of the appellant did not allude to one of the robbers having a swollen mouth. It is a fact therefore that PW2 did not give the police officers a description of the appellant in her first report that was recorded in the Occurrence Book. Further it is not clear how PW2 would have kept the appellant under observation for a period of 30 minutes or thereabouts but still fail to give the police the description of the appellant with such manifest feature if she infact was able to see him sufficiently to be able to identify him. It is instructive that the alleged robbery took place on 20th August, 2009. Hardly 30 minutes thereafter the incident was reported at Likoni Police Station. Within such short time, could PW2 have failed to describe such feature to the police?

In **Ajode v R [2004] 2 KLR 81**, this Court held that before an identification parade is held, a witness should be asked to give the description of the person sought to be identified. Ideally, that advance description of the person ought to be in writing and the same, together with parade forms availed to the trial court so that it can be compared with the description given of the accused. This was not the case here. That notwithstanding, PW2 claimed to have picked out the appellant on the basis of his swollen mouth. It is this evidence which was adopted and relied on by the trial court and confirmed by the first appellate court to found a conviction. However, there is no evidence that PW2 had seen the appellant with the swollen mouth during the incident. In any event, **Rule 6 (iv) (d)** of the Force Standing Orders requires that:-

> **"…..the accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance, and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent….."**

It appears that PW5 breached this requirement when he organised the parade. There is no evidence that there were attempts by this witness to cover the appellant's disfigurement, if any, as required. The identification parade having been conducted in such breach, the admissibility and credibility of such evidence is put in doubt. Indeed, **Rule 6 (iv) (n)** of the Force Standing Orders warns:-

> **"…..the parade must be conducted with scrupulous fairness, otherwise the value of the identifications as evidence will be lessened or nullified…"**

We are in the circumstances satisfied that there was no identification of the appellant at the scene as such identification, could not have been free from possibility of error and further since we have explained that the identification parade was not properly conducted for want of description of the appellant in the complainant's first report, and the manner in which the identification parade was carried out, the

subsequent identification of the appellant in court can only be dock identification. It is trite law that dock identification is generally worthless and a court should not place much reliance on it.

The last ground of appeal, we shall tackle is that both courts erred in law in holding that failure by the prosecution to call the informer, the complainant's neighbour, Christine, PC Wamalwa and PW3's wife did not weaken the prosecution's case.

The effect of failure by the prosecution to call witnesses to give relevant evidence at the trial was considered in the famous case of **Bukenya & others v Uganda [1972] E.A. 549**. On this aspect, this is what we recently stated in the case of **Beumazi Ndoro Chaila v Republic Msa CR. Appeal No. 94 of 2014** (UR):-

> **"The appellant took issue with the fact that the Investigating Officer was not called as a witness by the Prosecution. In Bukenya & Others v Uganda [1972] E.A. 549, the former East Africa Court of Appeal held that the Prosecution has a duty to call all witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had a duty to call any witness whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case. This proposition which we agree with in entirety was, however, espoused in the context where the evidence was barely adequate. This propositions must also be seen in light of Section 143 of the Evidence Act which provides that, in the absence of any requirement by provision of the law, no particular number of witnesses shall be required for the proof of any fact. In this case, there was no paucity of evidence. If anything, the evidence was simply overwhelming against the appellant. There were no loose ends within the prosecuting case that the said, Investigating Officer would have helped by his evidence to tie them up. In any event, the conviction of the appellant turned on the application of the doctrine of recent possession. In the circumstances, we are unable to appreciate what value the evidence of the Investigating Officer would have added to the other evidence already on record. In our view, he was a mere peripheral witness."**

We need not however, over emphasize the fact that while it is desirable that evidence of relevant witnesses should always be given where necessary, we nonetheless think that where the evidence is available and proves the prosecution case to the required standard, the absence of such other evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case and the weight of the evidence presented.

Police officers and crime busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses. There was therefore no reason for prosecution or indeed the court to have departed from this tradition. In any case, what value would have been attached to the informer's evidence? He would simply have reiterated the evidence of PW4.

As for Christine, the evidence on record suggests that she came to the scene long after the robbery had been committed and the robbers had bolted. Her role was limited to untying the hands of PW1 and PW2 and thereafter making a phone call to PW3 reporting the alleged robbery. What would have been the probative value of such evidence? None. PC Wamalwa in the company of PW4 visited the locus of the robbery. PW4 having testified in that regard, the evidence of PC Wamalwa would only have been repetitive. Finally, the evidence of PW3's wife would have been superfluous as she was away when the robbery was committed.

On the whole, we are satisfied that the evidence of these witnesses was not necessary and would have

added little value to the prosecution case. Accordingly, the absence of these pieces of evidence was not fatal to the appellant's conviction.

Otherwise, we have been persuaded that both the trial magistrate and justices of the High Court erred in law in their conclusions with regard to the re-appraisal of evidence as well as on question of identification of the appellant. In the result, the appeal has merit and is accordingly allowed. The conviction is quashed and the sentence imposed set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 11th day of March 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