IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL Nos. 375 & 379 OF 2012

BETWEEN

RAMA MAMBO NZUGA.....1ST APPELLANT

JAMES KILUNGI MLACHA.....2ND APPELLANT

AND

REPUBLIC.....R ESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Odero & Nzioka, JJ.) dated 18th September, 2012

in

CRIMINAL APPEAL NOS. 246 & 247 OF 2009)

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JUDGMENT OF THE COURT

The complainant who was, at the time material to this appeal, employed elsewhere as a watchman, collected his wages of Kshs.3,800/- from the Chief's office and as he walked home in the company of his brother-in law, PW2, he was attacked by six men and robbed of the entire sum of Kshs.3,800/-. In the course of the robbery the complainant sustained injury on the head for which he was later treated after reporting the incident to the police. Both the complainant and PW2 reported that two of the six robbers, were known to them. Those two, according to them, were the appellants herein. PW2 testified that the next day the appellants approached him and apologized for the attack. They sought also his assistance to intercede with the complainant. He agreed to escort them to meet the complainant the next day. Instead, the appellants went direct to the complainant and, in the presence of PW3 and another person, apologized for the attack and refunded Kshs.2,000/- promising to refund the balance of Kshs.1,800/- later. The complainant surrendered the money to the police who began the search for the appellants. They were traced in Taru having palm wine. Upon their arrest two identification parades were conducted, from which the complainant picked out the appellants.

The two were then charged with robbery with violence. In their defence, they denied committing the offence or offering an apology and refunding part of the stolen cash. They maintained that they were arrested for consuming palm wine and that they were surprised when they were charged with robbery

with violence. The 2nd appellant for his part added that, apart from being arrested over the consumption of palm wine, the complainant's brother had earlier on threatened him with unspecified consequences after the 2nd appellant accidently knocked him down with a bicycle.

The trial court considered the evidence by both sides and framed two questions: whether the appellants were positively identified, and whether, from the evidence presented the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code was committed. On the first question, the learned trial magistrate found that the appellants were recognized by both the complainant and PW2 as they were well known to the two prior to the date of the attack; that the next day the appellants approached both the complainant and PW2 and apologized; that in the presence of witnesses they refunded part of the stolen money to the complainant; and that, although identification parade was not necessary, the complainant once more picked out the appellants.

Regarding the second question the learned trial magistrate after identifying the three independent essential ingredients of robbery with violence under **section 296(2)** of the Penal Code, concluded that the appellants were in a group of six, armed with dangerous and offensive weapons, a metal rod, with which they attacked the complainant; and that in the process of robbing him they beat him up. In the end the learned trial magistrate found that the prosecution had beyond any reasonable doubt, proved the charge of robbery with violence. Upon convicting the appellants the learned trial magistrate imposed a death sentence on both.

The appellants' consolidated appeal to the High Court was dismissed with that court upholding the decision of the trial court, that there was overwhelming proof that the appellants were involved in the robbery.

This second appeal has been brought on six grounds. Mr. Ngumbau learned counsel for the appellant consolidated those grounds and argued them on three fronts; that the learned Judges of the High Court failed to re-evaluate the evidence; that the evidence of identification by recognition was weak; and that the two courts below ignored the appellants' respective defences. Counsel urged us to allow the appeal by quashing the conviction and setting aside the sentence because had the learned Judges re-evaluated the evidence as required of them they would have found that the prosecution evidence did not prove the offence charged; that nothing incriminating was recovered from the appellants; that the person who gave information leading to the arrest of the appellants was not disclosed nor was he called to testify; that the complainant did not name his attackers at the time he made the first report; that the first report made to the police related to a case of assault; that the evidence of PW1, PW2 and PW6 did not point to the appellants as the robbers; that the appellants denied refunding part of the stolen money as it would have been naïve to do such a thing; that the defence evidence was ignored; and that the appellants were not given a chance to mitigate. In his view, a proper consideration of these matters would have led to the conclusion of the appellants' innocence.

Mr. Kiprop, learned counsel for the respondent did not think there was any merit in the appeal. In his opinion, the evidence against the appellants was simply overwhelming. They were clearly recognized while in the company of four others; that, in the course of robbing the complainant, they inflicted injuries on him; that the appellants refunded part of the money they had stolen from the complainant; and that the two courts below considered this whole evidence as well as the appellants' defences.

In terms of **section 361** of the Criminal Procedure Code we are satisfied that we have jurisdiction to consider this appeal on the condensed grounds argued before us which, no doubt are matters of law.

The two courts below having concurrently found as a matter of fact that the appellants were well known to the complainant and PW2 and that the conditions for positive identification were present at the time of the robbery, we find nothing to suggest that in arriving at those findings the learned Judges misdirected themselves on the evidence that formed the basis of those findings. The two courts below re-evaluated the evidence of recognition and properly found that, other than the fact that the complainant and PW2 knew the appellants prior to the date material to this case, the two were later picked out in an identification parade quite apart from their conduct of apologizing and refunding to the complainant part

of the money stolen from him during the robbery. The High Court particularly analysed the evidence of recognition in great depth and detail, relying on **Anjonini & Others v. Republic** [1980] KLR 59.

Although the robbery occurred at about 7.00 pm, the complainant and PW2 were categorical that the appellants, being people known to them, they had no difficulty at all recognizing them. The complainant described the role played by each one of the appellants during the robbery. For instance he testified that it was the 1st appellant who was cycling the bicycle on which the 2nd appellant was the pillion passenger and that it was the 2nd appellant who hit him on the forehead with the iron bar. PW2 sought to know from the appellants why they were attacking the complainant. According to him he asked the question while standing very close (2 feet) to the robbers. While making the report of the attack, the complainant and PW2 told the police that out of the six robbers they recognized two. In **Anjonini** (supra), it was emphasized that:

> ***"….recognition of an assailant is more satisfactory, 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."***

While it is true that recognition is more assuring, it is nevertheless appreciated that sometimes mistakes may be made even in the case of recognition. However, from the subsequent conduct of the appellants, in addition to the evidence that the complainant and PW2 reported that they recognized them, we think that there was no room for a mistake.

The next day the appellants sought forgiveness from the complainant and PW1, and even refunded part of the cash. The appellants were also picked out in the police identification parade. Although the parade was not necessary in view of the fact that the appellants were known to the respondents, there was plausible explanation why it had to be conducted. There was confusion in the names of the appellants at the time the robbery was reported that made it necessary for the complainant to physically pick them out individually in a parade. Like the two courts below we are satisfied that the appellants were properly recognized.

The other question is whether the evidence disclosed an offence under **section 296(2)** of the Penal Code. It is now settled by a long line of decisions of this Court that the offence under **section 296(2)** is committed by proving any one of the following essential ingredients in addition to proving that there was theft;

> ***"a. The offender is armed with any dangerous and offensive weapon or instrument, or***
>
> ***b. The offender is in company with one or more person or persons, or***
>
> ***c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes and uses other personal violence to any person."***

See **Oluoch v R [1985] KLR549.**

There was, once again, concurrent finding of fact that both appellants, jointly with four others participated in the robbery thereby satisfying the second ingredient. Similarly there was medical evidence describing the nature of injuries suffered by the complainant which were in consonance with use of iron bar with which the appellants were armed. In short, all the three essential ingredients were met.

Both courts below also considered the appellants' respective defences but found no substance in them and rejected them.

We, for our part, find no merit in this appeal which we hereby dismiss in its entirety.

Dated and delivered at Mombasa this 29th day of April 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