IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 35 OF 2015

BETWEEN

1. JEREMIAH NYAGA

2. EDWARD MUTUA

3. MWANIKI NYAGA ……...…..…….APPELLANTS

AND

REPUBLIC …….....…..……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Kasango & Muya, JJ.) dated 26th November, 2013

in

H.C.CR.APP. Nos. 262 , 263 & 265 of 2010)

****

JUDGMENT OF THE COURT

Charles Onyango Awiti (PW1) and **Nasoro Badi** (PW2) were walking home from a funeral function at Shonda Village, Kilindini District of Mombasa at about 10.00 p.m. on 3rd August, 2009. On the way PW2 stepped back to attend to a call of nature as PW1 walked on. PW1 then met three people whom he saw clearly and recognized as the appellants because of the bright moonlight. He had known all of them previously and had infact met them during the day. The three asked him if he had met police officers on his way and he answered in the negative. As he made to pass them, he was suddenly hit on the back of the neck and fell down with a thud.

PW2 heard the fall and rushed towards him. He saw the appellants whom he also recognized, PW1 was at this time lying down on the ground. He approached them, stood a few metres away and watched as the events unfolded. There was light at the scene from the full moon. One of the appellants asked him to confirm if the person lying on the ground was known to him but on seeing that they were armed, he retreated and ran back to the funeral function shouting *"thief"*, *"thief"*. According to PW2 the 1st appellant went by the street name ***"Cassava."*** He was the one holding PW1 on the ground by his shoulders. The 2nd appellant went by the street name ***"Kaburu"***. He was the one who talked to him. The

3rd appellant was known as ***"Mwaniki"*** and was the one holding PW1 on the ground by his legs. They were all from the same estate as PW2.

As he retreated to the funeral function, he informed the mourners what had transpired and mentioned out the names of the appellants as the culprits. Thereafter in the company of some of the mourners they went to the scene and found PW1 comatose but the appellants had left. When he came to, PW1 realized that he had been robbed of his mobile phone, a pair of shoes, a wallet containing Kshs.650/-, and national identity card. In the process he had been injured on the neck and was bleeding. He was rushed to Inuka Police Post to report the incident and thence to Coast General Hospital where he was treated. Both PW1 and PW2 informed **CPL. Michael Situma** (PW3) of the police post that they had recognized the robbers at the scene and gave the street names as aforesaid.

The following day PW1, PW2 and other members of the public went looking for the appellants and managed to arrest them from various places within the estate. The appellants were then presented to PW3 who re-arrested them and after further investigations, preferred a charge of robbery with violence contrary to **section 296(2)** of the Penal Code. In the particulars of the offence, it was alleged that the appellants:-

> "on 3rd August, 2009 at Shonda Village in Kilindini District within Coast Province, being armed with dangerous weapons, namely pangas and iron bars, robbed **Charles Onyango** of a mobile phone, Nokia 6070, pair of shoes, an identity card and Kshs.650/- and at or immediately before or after the time of such robbery used actual violence on the said **Charles Onyango**."

On 14th August, 2009 the appellants appeared before the Chief Magistrate's Court at Mombasa and denied the charge. In defending themselves the appellants through unsworn statements of defence claimed that they had been arrested by members of the public for different reasons and not in connection with any robbery. They therefore denied involvement in the alleged robbery. To them the case was a mere frame up.

On 11th May, 2010, the appellants were convicted of the offence and sentenced to suffer death. They subsequently lodged Criminal Appeal numbers 262, 263 and 265 all of 2010 in the High Court at Mombasa against both conviction and sentence. At the hearing of the appeals by **Kasanga** and **Muya JJ**, they were consolidated and in a judgment delivered on 26th November, 2013, the two Judges found that the conviction of the appellants was supported by the evidence and accordingly dismissed the appeal.

The appellants were still aggrieved by that decision, preferred a second and perhaps last appeal in this Court on these four broad grounds that:-

i. Part of the prosecution case was conducted by an unqualified prosecutor.
ii. Evidence of identification was not free from possibility of error.
iii. The doctor who examined, treated and issued P3 form to PW1 was not called to testify, and finally
iv. Their defences were dismissed in a manner which suggested that the burden of proof had been shifted to them.

Miss Otieno, learned counsel was soon thereafter appointed by this Court to represent the appellants. With leave of the Court she filed one supplementary ground of appeal to wit; that the two courts below erred in law by denying the appellants the right to legal representation and therefore their rights to a fair trial were compromised.

Urging the appeal, Miss Otieno submitted that the High Court did not re-evaluate the evidence tendered in the trial court so as to arrive at its independent decision as required. In failing to do so the High Court did not appreciate that the alleged violence visited upon PW1 was not proved beyond reasonable doubt. That though PW1 claimed that he was assaulted in the process of the robbery, no P3 form was tendered; PW1 and PW2 did not describe the injuries sustained, and no treatment notes produced in evidence.

Counsel further submitted that the arrest of the appellants was suspect. They were allegedly arrested by a

vigilante group who never bothered to search their houses. Though PW1 and 2 claimed to have known the appellants prior to the incident, they never testified as to how they had come to know them and did not even give the physical description of the appellants to the police. Counsel further submitted that the items listed in the charge sheet as having been stolen from PW1 were different from those led in evidence.

On the question of legal representation, counsel submitted that the appellants were young men, who were appearing in court for the first time. They were not familiar with the rules of the game. They were thus ill prepared for the trial. That only lawyers are trained in the art of conducting criminal proceedings. The appellants were thus prejudiced in their defence with the consequence that they did not have a fair trial. The appellants ought to have been assigned counsel as they were facing a capital offence in terms of **Article 50(1)** of the Constitution, counsel submitted.

Responding to this last ground, **Mr. Monda**, learned Assistant Director of Public Prosecutions submitted that there was at the time no legal requirement for the appellants to be assigned legal counsel by the State. That from the proceedings, the appellants appreciated the proceedings; that they all requested and were given witness statements; that during the trial they extensively cross-examined the witnesses called by the prosecution; and that at some point they applied for the recall of PW3 for further cross-examination. The appellants were thus not prejudiced at all. Counsel further submitted that it is not in all cases that an accused should be afforded legal counsel. It is only in those cases where the accused would be prejudiced.

On the re-evaluation of the evidence by the High Court, counsel submitted that the High Court properly re-evaluated the evidence tendered in the trial court. All the issues raised by the appellants as pointing to the High Court's failure to re-appraise the evidence were properly addressed by the High Court. The High Court in particular exhaustively addressed itself on the identification by recognition of the appellants by both PW1 and PW2.

On the contradictions regarding the items stolen, counsel submitted that they were minor and did not go to the root of the prosecution case. They were, in any event curable under **section 382** of the Criminal Procedure Code. On the whole, counsel submitted that the two courts below made concurrent findings on the evidence tendered and that there was nothing on record to dislodge those findings and in particular on the credibility of witnesses.

We have anxiously considered the record of appeal and the rival oral submissions. As it has been constantly stated time without number, on a second appeal and by dint of **section 361** of the Criminal Procedure Code, we must limit ourselves to the consideration of issues of law only and we should be slow in interfering with the concurrent findings of the two courts below, unless we are satisfied that there was no evidence at all upon which those findings were anchored or if there was such evidence, it was of such nature that no reasonable tribunal properly directing itself could have based its decision thereon. See **Bonface Kamande & Another v Republic, Cr.App. No. 166 of 2004(UR).**

As we see it and from submissions of respective counsel, the issues of law for our determination have been narrowed to the following:-

i. Failure by the first appellate court to perform its duty of re-evaluating and re-appraising the evidence tendered in the trial court.
ii. Identification by recognition of the appellants.
iii. Consideration of the defence of the appellants, and
iv. The right to legal representation.

Addressing the first issue, it is a duty bestowed on the first appellate court to subject the evidence tendered in the trial court to a fresh and exhaustive re-evaluation so as to reach its independent conclusion regarding the guilt or otherwise of the appellant. However in undertaking the exercise the first appellate court must pay homage to the fact that, unlike the trial court, it did not have the benefit of seeing and hearing the witnesses as they testified and cannot therefore assess or determine their demeanour. **See Okeno v Republic (1972) EA. 32.**

However we hasten to add that there is no set format on how such an exercise should be undertaken. Every court will have its own way of doing so. What is not in doubt is that the re-evaluation must be self-evident in the judgment. Again it must be appreciated that whether or not such failure would be fatal to the respondent's case will depend on whether justice has thereby been compromised. In the case of **Mwamusi & Another v Republic, Cr. App. No. 226 of 2002 (UR)**, this Court observed as follows:-

> **"…. In our view the omission by the High Court to reconsider the evidence, re-evaluate it and draw its own conclusion and failure to give due consideration to each of the appellant's defences are fundamental errors. It is reasonably probable that the learned appellate Judges would not have dismissed the appeals had they directed themselves appropriately……"**

See also **Wanjiru v Republic (2008) 1 KLR**.

In the appeal before us, there is no doubt at all that the evidence before the trial court was re-examined afresh by the High Court. First the High Court summed up both the prosecution and defence cases in the trial court. Indeed the court even reproduced verbatim some extracts of the evidence tendered in the trial court in the course of their re-appraisal of the said evidence. All the issues raised by the appellant as evidence of failure by the High Court to re-evaluate the evidence were actually captured and addressed by the High Court. The court also addressed the recognition of the appellants *vis a vis* the evidence on record. The court even appreciated the fact that the trial court had not cautioned itself of the dangers of convicting the appellants on the evidence of a single identifying witness and proceeded to do so on its part. We note though that the High Court did not anywhere in its judgment specifically remind itself of that singular duty. However, that failure alone does not mean that the High Court did not perform its duty. On the whole therefore we are satisfied that the High Court properly scrutinized the evidence and came to its independent conclusion thereon contrary to the submission by the appellants that the judgment of the High Court simply re-stated the evidence of the trial court and thereafter merely responded to the grounds of appeal.

On identification by recognition, the two courts below came to the concurrent findings: that both PW1 and PW2 recognized the appellants during the incident; that they had seen them earlier in the day; that they knew the appellants to the robbery; that they were assisted in their recognition by the bright light emitted by the full moon at the scene; and that they were in close proximity with the appellants. As for PW2 he went as far as giving each of the appellants' street names and even described what he saw each one of them doing during the incident. We do not see any reason (s) why we should depart from these concurrent findings.

We are only too aware that evidence of identification ought to be handled with a lot of caution and circumspection. As this Court cautioned in the case of **Wamunga v Republic (1989) KLR 424**:-

> **".... It is trite law that where the only evidence against a defendant is evidence of identification or 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 a basis of a conviction."**

Given the set of circumstances by which both PW1 and PW2 came to recognize the appellants as outlined above, we are satisfied that their recognition cannot be faulted and was free from possibility of error. Indeed we are satisfied that the evidence was sufficient to be relied upon for a conviction.

Were the defences advanced by the appellants given thorough consideration by the two courts below? The record shows that the trial court did not at all address itself to the defences so as to come up with its findings thereon. What the trial court did was merely rehash the defences in the judgment without giving them due consideration. However that omission or anomaly was subsequently corrected by the High Court. This is how it delivered itself on the issue:-

> **"…. We have considered the appellants' defences and we find that they fail to shake the prosecutions evidence. We have noted that the appellants in their defences alluded to issues**

that were not put to the prosecution witnesses when they cross-examined them. The appellants did not question Nasoro on the place of their arrest in their cross-examination. Yet in their defences they contradicted Nasoro's evidence on the place of their arrest…."

On the right to legal representation we can only reiterate what we stated recently in the case of **Karisa Chengo & 2 others v Republic (2015) eKLR**. We delivered ourselves on the issue and stated that right of representation is a universally acknowledged right; particularly in cases involving a death penalty. In such cases, an accused person who cannot afford legal counsel is entitled to have counsel appointed on his behalf at State's expense. The provisions of **Article 19, 50, 50(2)(h)** and **261** of the Constitution make this abundantly clear.

However, the operation of this right is by no means automatic; for under the fifth schedule of the Constitution, Parliament has been tasked with the duty to enact legislation, setting guidelines within which State sponsored representation should operate. As of now we still lack such legislation. Consequently, the enforcement of the right to free representation at the State's expense remains aspirational and merely speculative. As was held in (**Karisa Chengo v R** (supra)).

We are aware that this holding is subject of an appeal to the Supreme Court now pending judgment. We hope that the Supreme Court will lay to rest this nagging problem. But for now we maintain that the correct position regarding the issue is as expounded in the above case. The foregoing notwithstanding and on the material before us, we are also satisfied that the appellants appreciated the proceedings and actively participated in the trial without hindrance. They suffered no prejudice at all.

In the result we find no merit in the appeal which we accordingly dismiss.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE- MAKHANDIA

……..

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR