IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 11 OF 2013

BETWEEN

ALI CHARO MATANO……..……..……..APPELLANT

AND

REPUBLIC ……...…...…...….RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Odero & Nzioka, JJ.) dated 19th December, 2012

in

H.C.CR.APP. No. 46 of 2009)

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JUDGMENT OF THE COURT

Mary Katche Masikini (PW 1), on 3rd March, 2006 at about 1 a.m. was asleep in her house in Bombululu area of Mombasa with her husband, **Harry Mitchell Maskini**, and her two sons and daughter, **Elizabeth Kabeyu** (PW 6). Her other son **Anderson Kapwere Maskini** (PW 2) was also asleep in his Swahili type house but within the same compound. Suddenly their sleep was rudely interrupted when a group of thugs invaded the compound. First to see them was PW 6. Apparently, she was awoken by people talking in low voices outside the window to her bedroom. On peeping she saw the thugs scale the perimeter wall, and thereafter force the house door open. They were armed with pangas, torches and stones. The security electricity light outside enabled her to see the thugs who numbered five. Immediately upon entry, they switched on the electricity light and PW 6 noticed that most of them wore dark T-shirts. However, one of them stood out, he wore a sleeveless grey T-shirt. According to her, he was the appellant. Besides the appellant was also in possession of a silver torch. She had known him very well as he also resided in Bombululu. He went by the name Ali and had a squint eye and a missing upper tooth. They ordered her to give them all the money that she had, and as they did so, they threatened to rape and indeed molested her by touching, rather indecently, her genitals.

Having stolen from her two mobile phones, radio, a camera, golden ring and cash Kshs.3,000/-, they moved to her parents' bedroom. They used a big stone to break the door down. Once inside, they were confronted by Harry Mitchell Maskini, deceased, who had armed himself with a bow and arrows. One of the thugs armed with an iron bar hit him on the head and he fell on the ground and was rendered comatose. They then turned on PW 1 with pangas and kicks as they demanded money. PW 6 who had followed the thugs to her parent's bedroom fearing that the thugs were bent on fatally injuring them pleaded with them to stop as she was willing to give them another Kshs.3,000/-. They still went on the rampage and stole from PW 1 and her husband two earrings, rings, mobile phone, wrist watch, wallet, gas cooker cylinder, DVD, bow and arrows as well as Kshs.50/-.

From there, the thugs proceeded to the house of their son, PW 2. The door to his bedroom was hit and it gave way. In came three thugs who were armed with pangas and iron bars. He was ordered to sit down and to give out money. His wife gave out Kshs.1,500/-. The thugs then helped themselves to his DVD player, Sanyo music player, three mobile phones and gas cylinder. It took the thugs 15 minutes to accomplish their mission. When they left, PW 2 peeped through the window and saw another thug standing outside. He did so with the aid of security light that was illuminating on him. He was wearing a greyish sleeveless t-shirt. Apparently, he was not among those who had entered his house.

In the meantime, a neighbour, **Daniel Munyasia Nyoni** (PW 3) was suddenly awakened from his sleep by screams of "*thieves*, *thieves*" emanating from PW1's house about 60 metres away. Realising that the neighbourhood was under attack by thugs, he immediately got out of the house and ran to the nearby Bombululu Police Post and reported the incident. Police officers responded immediately. They accompanied him back to the scene and found that the thugs had escaped. They unsuccessfully tried to pursue them. Those injured were rushed to hospital.

Resorting to self help, PW 2, PW 3 and other members of the public opted to block all entrances to the area. As they sat and waited, suddenly a security guard shouted that there were suspicious people coming their direction. Soon they spotted a man approaching them from across the road. He was wearing a grey sleeveless T-shirt. He appeared to be in hurry, frightened and was sweating profusely. He was armed with a silver torch. He was known to both PW 2 and PW 3 as Ali. PW 2 suspected that this was the very person he had seen under the lights during the robbery. He was stopped and when asked where he was coming from, he first indicated that he was from a friend's house. Pushed further he changed the story to coming from a beer den and later that he was from his house headed to a village elder's house to wake up his son so that they could proceed to Kongowea market to buy coconut for their business. As the interrogation intensified, the person suddenly took off into the night and left behind his silver torch.

At dawn they raided his house and found that the person had changed his clothes. However, the wife was prevailed upon to bring the clothes he had been wearing the previous day. She availed a sleeveless grey T-shirt and also confirmed that her husband had come home late in the night and without shoes. It was then that the person was arrested and frog marched to the home of PW 1 where PW 6 positively recognised him as the one who had the sleeveless T-shirt during the robbery and who went by the name Ali, the appellant. Interrogated further, he volunteered three names of his accomplices who too were traced and arrested. The crowd was baying for their blood and indeed attempted to set them ablaze but were thwarted by police led by **PC Joel M. Romaya** (PW 4) of Nyali Police Station who whisked the appellant and his accomplices away. PW 4 was then assigned to investigate the case. In the course of his investigations, he issued P3 Forms to PW 1 and PW 6. They were subsequently filled by **Dr. Chidgaye Swaleh** (PW 5) of Coast General Hospital. He classified the injuries sustained as harm. Unfortunately, Harry Mitchell Maskini could not recover from the injuries inflicted on him during the robbery and subsequently succumbed to them.

On completion of investigations, PW 4 found no evidence linking the two alleged accomplices with the incident and he released them. The appellant was not so lucky as he was then charged with four counts of robbery with violence contrary to **Section 296(2)** of the Penal Code in which the complainants were (PW 1), PW 2 and PW 6 and particulars of the items stolen from them given in each count. He was further charged with attempted rape of PW 6, contrary to **Section 4** of the Sexual Offences Act and in the alternative indecent assault on PW 6 contrary to **Section 11 (1) (6)** of the Sexual Offences Act.

The appellant appeared before the Chief Magistrate's Court at Mombasa on 20th March, 2006 and 2nd March, 2007 and denied the charges. He was subsequently tried. In his defence through unsworn statement and without calling witnesses, the appellant alleged that on 3rd March, 2006 at about 5 a.m., he was at a matatu stage waiting for a matatu to ferry him to his place of work at Kongowea. It was then that he was confronted by three men armed with pangas and rungus, one of them being PW 3. Since he had differed with him in the past, he panicked and ran away. He proceeded to the market but since he was not in the mood to work, he decided to go back home. At about 7.30 a.m. on his way home, he again encountered PW 3 and another man by the name **Mbotela**. They apprehended him and escorted him to a scene of crime. He was later handed over to the police and subsequently charged with offences he knew nothing about. As far as he was concerned, he was framed with the case over his previous disagreement with PW 3.

Nevertheless at the conclusion of the trial, the trial court was convinced that the prosecution had succeeded in proving the capital offences proffered against the appellant beyond reasonable doubt but that there was insufficient evidence to link him with the attempted rape charge, as well as the alternative count. The conviction resulted in the appellant being sentenced to death in respect of the first count whereas the sentences in respect of the other three counts was held in abeyance.

The appellant then opted to lodge an appeal as he was entitled to in the High Court at Mombasa. The appeal was in due course heard and in a judgment delivered on 19th December, 2012 by **Odero** and **Nzioka, JJ**, it was allowed in part. The appeal on counts 1 and 11 was allowed on account of the complainant in count 1, Harry Mitchell Maskini having passed on before testifying. In respect of count 11, the High Court held that PW 1 testified that she could not identify any of the thugs. Accordingly, the appellant should have been given the benefit of doubt in that respect. The first appellate court however upheld the conviction and sentence in respect of counts 111 and IV.

Still unsatisfied with the determination reached by the High Court in his first appeal, the appellant has now approached this Court by way of a second and perhaps last appeal.The appellant complains that the first appellate court erred in not considering that the evidence of identification by recognition was shaky and unbelievable, that the judgment was a nullity due to the delay in its delivery and lastly, that the prosecution shifted the burden of proof to him.

Arguing the appeal, **Mr. Nabwana**, learned counsel for the appellant submitted that the state of lighting at the scene of crime was not interrogated. PW 1 contended that she was unable to identify any of the thugs whereas PW 2 testified that he did not see the face of the appellant. That the evidence of PW 6 on the same subject was extremely shaky and unbelievable. It depicts the difficult and terrifying moments she underwent. In those circumstances, it could not have been possible for the witness to recognize the appellant. That both courts below did not appreciate the need to caution themselves of the dangers of relying on the evidence of a single identifying witness. That failure affected the appellant's case negatively. With regard to burden of proof, counsel submitted that the two courts shifted the burden to the appellant when they failed to analyse the evidence of the appellant objectively.

Responding, **Mr. Yamina**, Principal Prosecution Counsel, submitted that the High Court, having quashed the conviction of the appellant on count 1, her evidence was irrelevant. That the High Court analysed the evidence with regard to each count to determine whether or not the appellant could have been identified given the circumstances. In dismissing the appeal on counts 111 and IV, the court determined that the complainants had been able to see and positively recognize the appellant. That there was light at the scene both outside and inside the houses contrary to the submissions of the appellant. Coupled with this, there was also a first report to the police by PW 6 in which he mentioned the name of the appellant. Besides, the court had at the invitation of the appellant confirmed that he had a missing upper tooth as well as squint eye just as described by PW 6. Counsel conceded though that the courts had failed to warn themselves of the danger of relying on the evidence of a single identifying witness to found a conviction. However, counsel submitted that the High Court was alive to that fact and the need to look for corroborative evidence which it did. He accordingly urged us to dismiss the appeal.

In a second appeal, our mandate is restricted by dint of **section 361** of the Criminal Procedure Code to

consideration of matters of law only. Moreover, we cannot interfere with the concurrent findings of the courts below unless we find such findings to be perverse. All these principles have been stated in a host of decisions of this Court such as in **Obedi Kilonzo Kerero v Republic [2015] eKLR**. In that case this Court delivered itself thus:

> **"The law is that on a second appeal the Court of Appeal is restricted to consider only points of law …. This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by two courts below unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision."**

These are the injunctions that will guide us in determining the appeal before us. In terms of **Section 361** of the Criminal Procedure Code, we are satisfied that we have jurisdiction to consider this appeal on the grounds argued before us which, no doubt are matters of law.

The two courts below concurrently found as a matter of fact that the appellant was well known to both PW 2 and PW 6 as Ali. That he came from Bombululu; that there were security and electric lights outside and inside the houses during the robbery; that upon return from the hospital, PW 6 told the police at scene and in her first report that she had identified one of the thugs as Ali; that when the police arrested a man known as Ali and brought to him her, she realized it was the wrong Ali and disowned him; that upon the arrest of the appellant, she positively identified him as the Ali she was talking about with regard to the robbery although he had by then changed clothes; that the appellant had a squint eye and also had one upper tooth missing just as described by PW 6; that when stopped by PW 2 and PW 3 in the dead of the night, the appellant was frightened, sweating and on being questioned fled the scene leaving behind his silver torch; that PW 6 gave evidence of seeing the appellant with a similar torch during the robbery; that PW 2 and PW 3 together with others went to the house of the appellant the following morning and found he had changed clothes but managed to recover a sleeveless grey T-shirt; that a similar T-shirt had been worn by Ali during the robbery; and, that the conditions obtaining during the robbery were positive for recognition since the appellant and his cohorts spent some time with the complainants and were not disguised at all. Considering all these factors and more so the fact that the appellant was a well known person to some of these witnesses, his recognition was easy and not mistaken as there were lights outside and inside the houses. Similarly, he was also identified by the sleeveless T-shirt he wore during the robbery which was recovered in his house during his arrest. His conduct of fleeing during the interrogation and leaving behind a silver torch, did not depict conduct of an innocent man. They discounted the defence advanced by the appellant as an afterthought. We find nothing to suggest that in arriving at the findings, the trial court and the learned Judges misdirected themselves on the evidence that formed the basis of those findings.

The two courts below properly evaluated and re-evaluated the evidence of recognition and properly found that it was simply overwhelming. It is indeed not lost on us that the High Court analysed the evidence of recognition in great depth and detail. While it is true that recognition is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. It is nevertheless appreciated that sometimes, mistakes may be made even in the case of recognition. (see **Anjononi & others v Republic [1980] KLR 59)**, However, on the basis of the evidence of record, we are satisfied that there was no room for such a mistake.

Turning to the question whether the judgment of the first appellate court was a nullity and whilst the Criminal Procedure Code does not prescribe a time limit for delivery of judgments, **Article 159(2)(b)** of the Constitution declares that justice shall not be delayed. We note that though the hearing of the first appeal was concluded on 7th February, 2012, it was not until 19th December, 2012 that the judgment was delivered. There was therefore a delay of about ten months. We think that the appellant is justified in this complaint. However, is a delayed judgment a nullity? **Sections 168** through to **169** of the Criminal Procedure Code deals with judgments and is silent on when the judgment should be prepared and delivered. However, this is not to say that judicial officers should enjoy the luxury of delaying the delivery of judgments and rulings. Judgments and rulings should be delivered timeously. Time for leisurely conduct of judicial business now belongs to the dust bin of history, given that judicial officers

are now subject to performance management and measurement appraisals. Of course delayed judgments only prolongs and increases the stress and anxiety caused by litigation. It also weakens public confidence in the whole judicial process. See **Stephen Kaleng Makalale & Another v Republic [2010] eKLR** and **Isaac Mturi Mbuni v Republic, MLD, CR.APP. No. 20 of 2013** (UR).

The Judges acknowledged and appreciated the delay in the delivery of the judgment in this case, and offered convincing explanation that the delay was not deliberate. It was occasioned by factors beyond their control; first pressure of work at the station, secondly, the file disappeared when the judgment was halfway typed by the secretary, thirdly, confusion as to the obtaining position regarding whether or not it had been delivered between the court, appellant and the office of Director of Public Prosecutions, fourthly, investigations launched regarding the disappearance of the court file, and lastly the appointment of one of the Judges as the Chair of the Judicial Commission of Inquiry into the Ethnic Violence in the then Tana River District. We think that these reasons are plausible and valid.

On the last ground of appeal that the burden of proof was shifted to the appellant contrary to law, we are of the firm view that this complaint is not legitimate at all. The basis of the complaint is that the two courts below failed to analyse his defence objectively, and concluded that by running away without explanation, the appellant was guilty. Looking at the entire evidence on record, there can be no basis for this complaint. Both courts subjected the evidence of the prosecution as well as that of the appellant to exhaustive evaluation as well as re-evaluation as required. The appellant's defence was duly considered not in isolation but in the light of the entire evidence, hence the observation by the trial court with regard to the appellant running away from the scene as he was being interrogated. The appellant indeed confirmed in his own testimony that fact and gave an explanation. That explanation was weighed by the trial court and the first appellate court against the other evidence on record and found wanting. It cannot therefore be said that by disbelieving the appellant's defence, the trial court thereby shifted the burden of proof to the appellant. That cannot be true.

The appeal is accordingly dismissed in its entirety.

Dated and delivered at Mombasa this 27th day of May, 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