



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CRIMINAL APPEAL NO. 244 OF 2011**

**BETWEEN**

**GEORGE WALUSUMBI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Ojwang & Odero, JJ.)  
dated 26<sup>th</sup> August, 2011*

*in*

*H.C.CR. APP. No. 86 of 2007)*

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**JUDGMENT OF THE COURT**

The complainant, **David Gatune Kimani** (PW1) was on 27<sup>th</sup> January, 2006 at about 10.30 p.m. on his way home when he was attacked by three men, among them the appellant. Before the attack, PW1 had met the three men as they emerged behind a fig tree. They passed each other and with the aid of the bright street lights at the scene, PW1 was able to recognize the appellant among them. He had known him prior to this occasion because he used to frequent the dumping site in search of valuables and PW1 would meet him every morning as he took his child to school. Soon after passing them and on turning back to look at them again for the reason that they had suddenly gone quite, he was hit on the head with an iron bar and a stone and he fell down. As the scuffle ensued one of the attackers emptied PW1's pocket which had Kshs.10,000/-, a mobile phone, identity and ATM cards. As they ran away, PW1 raised an alarm and a chase ensued with the help of churchgoers who had responded to PW1's screams. They pursued the appellant until they cornered and arrested him. In pursuit of the appellant PW1 and the churchgoers never lost sight of him even after the attackers split ways at a junction on the main road.

Meanwhile **P.C Zakayo Chirchir Rono** (PW 4), **P.C Nguru** and **P.C Mwanjata** were on the beat in the area when they were attracted by the screams of "thief", "thief". They rushed to the scene and found members of the public pinning down the appellant, claiming that he had been in the company of other attackers who had robbed PW1 of his valuables. Together with **P.C Samuel Ondara** (PW2), the investigating officer, they re-arrested the appellant and escorted him to Likoni Police Station. Since PW1 had sustained serious injuries, PW2 issued him with P3 form which was duly filled by **Dr. Lawrence**

**Ngone** (PW3) of Coast General Hospital. He assessed the degree of injury as harm and the probable weapon used blunt. After investigations PW2 preferred against the appellant a single charge of robbery with violence contrary to **Section 296(2)** of the Penal Code, brief particulars being that on 27<sup>th</sup> January 2006, at around 10.30 p.m., at Likoni flats, jointly with others not before court, whilst armed with dangerous weapons, namely knives and iron bar robbed PW1 Kshs.10,000/- one mobile phone, an identity card, ATM Card and at or immediately before or after the time of such robbery used actual violence on the said PW1.

At the conclusion of the prosecution case before the Chief Magistrate's Court at Mombasa and when called upon to defend himself, the appellant elected to remain silent. In the end, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt against the appellant whom it convicted and thereafter sentenced to death.

Aggrieved by the conviction and sentence, the appellant preferred an appeal to the High Court at Mombasa. In a judgment delivered on 26<sup>th</sup> August, 2011 the High Court (**Ojwang, J.** (as he then was) and **Odero, J.**) dismissed the appeal thereby precipitating this second and perhaps last appeal. In his home-drawn grounds of appeal, the appellant seeks to impugn the judgment of the High Court on the grounds that the evidence of recognition relied on by the two courts was unsafe to warrant a conviction. That there was no exhaustive re-evaluation of the evidence of the trial court by the High Court so as to reach its own independent conclusion as required and finally that his conviction was arrived at without his defence being given due consideration.

Urging the appeal, **Miss Otieno**, learned counsel for the appellant submitted that the first appellate court failed in its duty to subject the evidence tendered before the trial court to fresh analysis and exhaustive evaluation. That there were several contradictions and inconsistencies in the prosecution case such that had the High Court performed its statutory duty as required, it would have come to the conclusion that reasonable doubts were created in the prosecution case and resolved those doubts in favour of the appellant. Counsel further submitted that the circumstances of recognition were difficult as PW1 was attacked from behind. That this was a case of a single recognizing witness whose evidence should be approached with caution. Finally counsel submitted that the court relied on the evidence of PW1 and PW4 who were not at the scene when the appellant was allegedly cornered and arrested.

Opposing the appeal, **Mr. Musyoki**, learned Senior Prosecution Counsel submitted that the appellant was properly convicted and sentenced. That the ingredients of the offence were proved beyond reasonable doubt. That the evidence showed that the appellant was in the company of two other persons when they committed the offence and were dangerously armed. That since the appellant was well known to PW1 this was therefore a case of recognition as opposed to visual identification of a stranger. Further that this was a case of chase and arrest without PW1 losing sight of the appellant. With regard to the re-evaluation of the evidence by the High Court, counsel submitted that the High Court performed its task satisfactorily as it was self-evident in the judgment.

Naturally the appellant is now before us on a second appeal. That being so only matters of law fall for our consideration – See **Section 361** of the Criminal Procedure Code. As this Court has stated consistently, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are shown demonstrably to have acted on wrong principles in making the findings – **Chemagong v R [1984] KLR 611**.

The two courts reached the following concurrent findings of fact; that:-

1. PW1 was on his way home when he was attacked by three men who were armed with an iron bar and a stone;
2. PW1 recognised the appellant among them;
3. The appellant was a person well known to PW1 prior to the incident;

4. The scene of crime was well lit by electric light;
5. As they assaulted PW1 the attackers also robbed him of the items listed in the charge sheet;
6. The complainant raised alarm and churchgoers responded and pursued the appellant until he was cornered in the church compound and arrested;
7. During the pursuit, PW1 and the churchgoers never lost sight of the appellant;
8. Since this was a case of chase and arrest of the appellant without losing track of him, his identification and or recognition could not be faulted;
9. It was a case of recognition as opposed to visual identification of a stranger; and finally,
10. The appellant was part of the gang of robbers as confirmed by the evidence of PW4 who arrived at the scene without delay and re-arrested him.

These concurrent findings were supported by evidence presented by the prosecution. We discern no misapprehension of the evidence by both the trial as well as the first appellate court; nor can we say that in arriving at those conclusions the two courts acted on wrong principles.

On the question of failure by the 1<sup>st</sup> appellate court to subject the evidence from the trial court to fresh and exhaustive analysis, we find the complaint to be without merit. This complaint is anchored on the fact that there were contradictions and inconsistencies in the prosecution case that were not resolved in favour of the appellant. Some of the contradictions alluded to are the number of attackers involved in the robbery. That in his examination in chief, PW1 talked of being attacked by three men whereas under cross-examination he talked of not being attacked by the three; the place of arrest of the appellant, whether it was in the church compound or the bar; time of incident, whether it was at 10.00 p.m. or midnight and that the charge sheet stated that the offence was committed on 28<sup>th</sup> January 2006 whereas PW1 talked of 27<sup>th</sup> January, 2006. To our mind some of these alleged contradictions are mere typographical errors whereas others are actually so minor that they count for nothing if the entire evidence led by the prosecution is contextualized. People do not perceive things in the same manner. There are bound to be variations in perceptions and as long as those variations, contradictions or inconsistencies are minor and do not go to the root of the prosecution case, due allowance should be given for human frailty. And as this Court succinctly stated in **Kimeu v Republic [2002] 1 KAR 757:-**

**“The position in law is that it is not every conflict between the particular of the charge and evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernable prejudice is caused to the accused.”**

We do not think that the judges of the High Court in these circumstances can be accused of abdicating their statutory duty merely because they did not advert to the alleged minor contradictions if at all. In any event the alleged contradictions are easily curable by the application of **Section 382** of the Criminal Procedure Code. Above all the contradictions identified here are matters of fact.

Of course there is no impediment to a conviction turning on the evidence of a single identifying or recognizing witness. What is required is the treatment of such evidence with caution and greater circumspection knowing that mistakes in recognition are often made in some cases where even a relative is involved. See **Wamunga v Republic [1989] KLR 424**. In the circumstances of this case, the evidence of recognition of the appellant by PW1 was not controverted at all. Indeed the appellant himself conceded to knowing PW1. The attack on PW1 was not sudden. In fact when PW1 first encountered the appellant and his accomplices, they were talking amongst themselves. The encounter was at a place well lit by electricity. PW1's antennae only went up when suddenly the three stopped talking. It is when he turned to look at them that he was attacked. The appellant, being a person well known to PW1 given the circumstances would not have mistaken the appellant for someone else.

Besides recognition, there was the evidence of chase and arrest of the appellant. PW1 with the assistance of churchgoers pursued the appellant without losing sight of him until they cornered and arrested him in the church compound. It has been held that:-

**“ ....The identification of a person who took part in the alleged offence and was chased from the scene of crime to the place where he was arrested is of course strong evidence of identification and if all links in the chain are sound, it may be safely relied upon to found a conviction ...”.**

See **Ali Ramadhani v Republic, Criminal Appeal No. 79 of 1988 (UR)**. In the circumstances of this case there was no break in the chain as at no point during the chase, did PW1 and other pursuers lose sight of the appellant until they arrested him. The totality of the evidence of recognition is that it was safe and the conviction of the appellant based on the same cannot be faulted.

For the foregoing reasons, we have demonstrated that this appeal lacks merit; it is dismissed with the result that the conviction and sentence imposed on the appellant shall stand.

**Dated and delivered at Malindi this 17<sup>th</sup> day of June, 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**