IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: G.B.M. KARIUKI, AZANGALALA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 31 OF 2015

BETWEEN

MICHAEL NORMAN MBACHU NJOROGE.....1ST APPELLANT

SAMUEL WAMUGURI MWIHAKI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ.) dated 24th July, 2013

in

H.C. Cr. A. No. 73 & 84 of 2007)

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JUDGMENT OF THE COURT

[1] The appellants, ***Michael Norman Mbachu Njoroge***, *(1st appellant)* and ***Samuel Wamuguri Mwihaki***, *(2nd appellant)*, were charged in the Senior Resident Magistrate's Court at Githunguri with two counts of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***.

[2] The Prosecution case was that the appellants, who were in a group of four accosted ***Juma Ochieng Ericson, (PW 2), (Ochieng) and Samuel Lakakeng Kerebei, (PW 1), (Kerebei),*** who were in a bread delivery motor vehicle registration number KAU 496U, Isuzu Canter at Githiga Market along Githunguri/Lari Road in Kiambu County. ***Kerebei*** was driving the said motor vehicle whilst ***Ochieng*** was a salesman and sat in the driver's cabin with ***Kerebei***. It was in the morning at around 9 a.m. or 10 a.m. The road had pot holes which slowed down the motor vehicle's motion. That is when ***Ochieng*** and ***Kerebei*** were attacked. A thug wielding an AK 47 rifle smashed the windscreen of their motor vehicle which destabilized ***Kerebei*** and the vehicle went off the road.

[3] The gun-wielding thug entered the motor vehicle and hit ***Kerebei*** on the hand and head. Three other thugs also entered the vehicle through the passenger door. The thug with the gun took over the driving as ***Kerebei*** and ***Ochieng*** were sandwiched between them.

Ochieng was pushed under the dashboard. The thugs demanded money and ***Kerebei*** gave them Kshs. 800/= as he begged them not to kill them. The thugs then took their mobile phones and locked them at the

rear of their motor vehicle. After a while, members of the public opened for them and they discovered that the day's proceeds of sale amounting to Kshs.12,900/=, had been stolen by the thugs.

[4] ***Ochieng*** then went to report the robbery to Githiga Administration Police Camp (APC Camp), and returned to the scene with Administration Police Constable, ***Bernard Mutai, (PW 3), (APC Mutai), and Cpl Ephantus Ndirangu, (PW 5), (Cpl Ndirangu)***.

[5] In the intervening period, three (3) persons were taken to the scene by members of the public where ***Kerebei*** allegedly identified them as members of the gang which had robbed the duo. On his return, ***Ochieng*** also allegedly identified the three as members of the gang which had attacked them. The three people included the appellants herein. By the time the three persons were taken to the scene, they had been thoroughly beaten and one of them eventually succumbed to his injuries before trial.

[6] The appellants were escorted to Githunguri Police Station where ***PC Wilson Mwangangi, (PW 7), (PC Mwangangi)*** re-arrested them. They were later charged as already stated. ***Kerebei*** was treated for his injuries at Githunguri Health Centre by ***Faith Mungai, (PW 6),*** a Clinical Officer, who classified the injuries as harm.

[7] After a full trial, the appellants were convicted of the offence of robbery with violence on the first count and that of simple robbery under ***Section 296 (1)*** of the ***Penal Code*** on the second count. On the 1st Count, they were sentenced to death and on the second count, they were ordered to serve five (5) years imprisonment.

[8] Dissatisfied with the verdict, the appellants appealed to the High Court but the High Court ***(A. Mbogholi Msagha and L. A. Achode, JJ.)***, on 24th July, 2013, dismissed their appeals. The learned Judges further expressed the view that both appellants should have been convicted for capital robbery on count two as, in their view, ingredients of robbery under ***Section 296 (2)*** of the ***Penal Code*** were demonstrated by the Prosecution. However, *"since no notice of intention to enhance sentence in count two was served upon the appellants"*, the learned Judges declined to interfere with the sentence which had been imposed by the Senior Resident Magistrate on that count .

[9] The appellants were still dissatisfied and therefore lodged the appeal before us. ***Mr. Swaka***, learned counsel who argued the appeal before us, abandoned the home-made grounds of appeal filed by the appellants in person and relied upon supplementary grounds of appeal he had filed. In his submissions, ***Mr. Swaka*** raised the following issues: Poor and weak identification evidence; failure to call essential witnesses and failure to consider the *alibi* defence set up by the appellants.

[10] *Ms Maina*, learned ***Senior Prosecution Counsel*** for the respondent State, conceded the appeal on the ground that all the links in the chain of the chase from the scene of crime to the place of the appellant's arrest were not sound. In learned counsel's view, the chain was broken as the prosecution failed to call members of the public who arrested the appellants and received weapons purportedly used by the attackers.

[11] As this is a second appeal, only matters of law fall for our consideration by dint of the provisions of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code Chapter 75 Laws of Kenya***. The said section reads as follows:

> ***"361 (1)***
>
> ***A party to an appeal from a subordinate court may, subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal:***
>
> ***(a) On a matter of fact; and severity of sentence is a matter of fact;***
>
> ***(b) against sentence except where the sentence has been enhanced by the High Court, unless the***

subordinate court had no power under Section 7 to pass the sentence".

The position has been restated in many decisions of this Court. (See for instance ***Njoroge v R, [1982] KLR 388*** and ***Thiong'o v R, [2004] 1 E A 333)*** among many others.

[12] In our view, the complaints made against findings on identification; the failure to call essential witnesses and the failure to consider the *alibi* defence set up by the appellants clearly raise issues of law. We accordingly have jurisdiction to entertain the appeal.

[13] The issue of identification has caused us considerable anxiety. The offence may have occurred in broad daylight i.e. at about 9.00 a.m. or 10 a.m. and ***Kerebei*** and ***Ochieng*** may also have taken sometime with the attackers. However, after carefully considering the record, it is with regret that we must state that neither the trial magistrate nor the learned Judges of the High Court sufficiently evaluated and appreciated the evidence of ***Kerebei*** and ***Ochieng*** on identification.

[14] The learned trial magistrate stated, regarding the two witnesses: -

> ***"The three robbers were arrested soon thereafter and the very weapons used against the complainants recovered with them.***
>
> ***In the foregoing, I was (have) found that the prevailing circumstances favoured proper identification of the accused persons by PW 1 and PW 2. The robbery took place during the day. The robbers' faces were uncovered. The complainants' faces too were not blinded even at the time when they were being relieved off (sic) their property. They were with the 4 men aforesaid for about 15-20 minutes. They stood closely at all material time. The 3 robbers were arrested soon thereafter and the very weapons used against the complainants recovered with them.***
>
> ***In the foregoing, I had no reasons to doubt the identification of the 1st and 2nd accused by PW 1 and PW II".***

[15] The learned Judges of the High Court agreed with the trial magistrate on the issue of identification. In their own words: -

> ***"PW 1 testified that they were together for about 15-20 minutes, while PW 2 stated that the robbery lasted some 20 minutes. In all that time, the witnesses were not blindfolded. After the robbery, three of the robbers were apprehended by members of the public a short distance from the scene and escorted back to the scene of the robbery within minutes. Both witnesses were able to identify them as those who had robbed them. They wore the same clothings and the weapons used in the robbery were recovered on them".***

[16] As we observed, those findings of the trial magistrate, confirmed by the learned Judges of the High Court, have caused us consideration anxiety. Our concern is informed by the criminal law jurisprudence we have developed which ensures, as far as humanly possible, that an innocent person does not suffer the sanction of the criminal law in this case, the ultimate penalty of death. That is why we have severally held that dock identification is generally worthless. (See ***Ajode - v- Republic, [2004] 2 KLR 32,*** among others).

[17] In this case, our perusal of the record shows that the appellants were not arrested at the scene. Their arrest was also not effected following the descriptions of ***Kerebei*** and ***Ochieng***. The appellants were arrested by members of the public one kilometer away from the scene according to the testimony of ***Kerebei***. We have our doubts whether a distance of one kilometer may be described as ***"a short distance"*** as stated by the learned Judges of the High Court. We doubt also whether given that course of the chase, the arrest of the appellants took only a few minutes after the attack.

[18] The record further shows that the testimony of the recovery of weapons used during the robbery was given by ***APC Mutai, Cpl. Ndirangu*** and ***PC Mungai***. The three witnesses did not agree on where the

recovery of the weapons was made. APC Mutai stated, in his evidence in chief:

> ***"I found a homemade AK - 47 with members of the public ... and a homemade pistol also before the court....***
>
> ***A knife and metal blade had also been recovered from accused".***

It is clear from the statement that the recovery was made by members of the public.

APC Mutai however, in answer to the 2nd appellant, in cross-examination, made a strange statement that *"When the weapons were recovered from you, I was there"* . That was a clear contradiction from his earlier statement and could not be believed.

[19] On his part, ***Cpl Ndirangu*** was categorical that all recovered items were handed to him by a member of the public and that nothing was recovered from the appellants. ***PC Mwangangi*** on his part testified that when he arrived at the scene, he found the weapons used during the robbery "*kept next to the 1st appellant"*.

[20] Given the above testimony on the recovery of the weapons, it is clear that no weapons were found on the appellants by the three witnesses. The weapons used during the robbery were recovered by members of the public. We will never know from whom the members of the public recovered the weapons used in the robbery because no member of the public who arrested the appellants testified.

[21] The failure to call a member of the public who effected the arrest fo the appellants further meant that a link between the appellants and the commission of the robbery was broken.

[22] It is plain therefore that both the trial court and the High Court do not appear to have appreciated that absent the testimony of a member of the public, there was no evidence on how the appellants' were identified by the members of the public who arrested them since the appellants were arrested even before ***Kerebei*** and ***Ochieng*** described them. It could be that members of the public may have witnessed the robbery on ***Kerebei*** and ***Ochieng*** and then gave chase after the robbers and without losing site of them, caught up with them and arrested them. Absent, the testimony of a member of the public who participated in the arrest of the appellants, the chain of events from the attack to the arrest was broken and doubt was created as to whether the appellants were among the gang which attacked ***Kerebei*** and ***Ochieng***.

[23] Both the trial court and the High Court placed a lot of premium on their observation that ***Kerebei*** and ***Ochieng*** were able to positively identify the appellants from their appearance and their attire. True, the robbery took place in broad daylight and the robbery may have taken some time. Yet the following facts emerged. The attackers were believed to be heavily armed. They threatened ***Kerebei*** and ***Ochieng*** with those weapons. ***Ochieng*** was indeed pushed under the dashboard of their vehicle. The appellants, on being arrested, were thoroughly beaten by members of the public. There is no doubt that their beating was severe as one of the persons arrested succumbed to the injuries he sustained from the beating. ***Kerebei*** testified that when the appellants were taken to the scene after their arrest by members of the public, their *"clothes were torn"*. According to ***APC Mutai***, the appellants were cut with pangas by members of the public. ***Cpl Ndirangu*** testified that the appellants were beaten badly, had bruises all over their bodies, were bleeding and *"their clothes had been torn up"*.

[24] Given the description of the appearance of the appellants after their arrest, we entertain doubt as to whether ***Kerebei*** and ***Ochieng*** who had been attacked by people who had no injuries, were not bleeding and whose clothes were not torn would positively identify them as members of the gang which had attacked them. The appellants were also taken to the scene by members of the public ***as the robbers***. In our view, it was natural for ***Kerebei*** and ***Ochieng*** to agree with members of the public that the appellants must have been the robbers otherwise, *why would they have been arrested?* As was stated in ***Kamau -v- Republic, [1975] EA 139***:

> ***"The most honest of witnesses can be mistaken when it comes to identification"***.

[25] The evidence of ***Kerebei*** and ***Ochieng*** on the identification of the appellants was not different from that of identification in the dock of the court. We say so, because, the two witnesses had not known the appellants prior to the incident. When the appellants were taken to the two witnesses under arrest, it was self-evident to them that the appellants were the people the members of the public wanted identified with the robbery. Such identification is like identification of an accused person in court by a complainant which we have held severally before to be worthless without an earlier identification parade.

[26] In this case, after the arrest of the appellants, they should have been taken to the nearby AP Camp for onward transmission to the nearest police station where a proper identification parade would have been mounted. When the appellants were taken to the scene where ***Kerebei*** and ***Ochieng*** were, it was nigh impossible for them to say the appellants were not the robbers.

[27] This is not a case where the two witnesses detained the attackers, nor was it a case where the witnesses chased the appellants throughout till they were arrested without losing sight of the appellants at any time. It is a case where the witnesses having been attacked were locked in the motor vehicle until released by members of the public. Other members of the public arrested the appellants one kilometer away from the scene and took them to the scene. Much as the trial court and the High Court may have felt that the case against the appellants was a straight forward one, we, with respect, think that on a proper analysis and evaluation, both courts below would not have felt able to conclude that the evidence on identification was watertight. The law as regards the standard to be applied when considering a case in which an accused person denies his identification is now well settled.

[28] In ***Roria -vs R, [1967] EA 583***, the predecessor of this Court, stated (*as per Sir Clement de Lestang, VP), inter alia*, as follows:

> ***"A conviction resting entirely on identity, invariably causes a degree of uneasiness and as Lord Gardner, L.C. said recently in the House of Lords, in the course of a debate on Section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the courts to interfere with verdicts:***
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> ***There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine cases out of ten if there are as many as ten-it is in a question of identity' ".***

[29] Given that nine out of ten persons convicted on the basis of visual identification could be innocent, the court needs to examine evidence of identification of an accused person with the greatest care to avoid a situation where an innocent person is convicted merely because of evidence of witnesses who may be honest but are nonetheless, mistaken on their identification of the accused person or persons.

(See ***Kamau -v- Republic, (supra)***).

[30] Further a field in the English case of ***R v Turnbull and Others, [1976] 3 All ER, 549, Lord Widgery, C.J.,*** set out succinctly what the courts should look for when considering evidence of identification of an accused in a criminal case. He, *inter alia*, stated:

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words.***
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> ***Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation. At what distance? In what light? Was the observation impeded in any way, as***

for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the accused when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have a reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such description the prosecution should supply them".

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality the greater the danger".

[31] The factors stated by ***Lord Widgery, C.J.,*** in the ***Turnbull*** case are some of the factors which a trial court and in our case also, the first appellate court, need to consider in their duty in examining the evidence on identification. It is only after considering those factors that the court may feel safe to convict at the trial level and confirm the conviction at the first appellate court level based on identification. [32] The sentiments of ***Lord Widgery, C.J***., in the ***Turnbull*** case (supra), have been approved by our courts. In the case of ***Francis Kariuki Njuri & 7 Others -v- Republic, [Criminal Appeal No. 6 of 2007] (UR)***, the Court, *inter alia*, stated as

follows: -

"The law on identification is well settled and this Court has from time to time said that the evidence of identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See R -v- Turnbull, (1976) 63 Cr. App. R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity, or at all. This Court in Mohamed Elibite Hibuya & Another -v- R, (Criminal Appeal No. 22 of 1996), (unreported) held that: -

'It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the suspicious details regarding his features given to any one and particularly to the police at first opportunity'".

[33] In this case, the evidence of ***Kerebei*** and ***Ochieng*** on the identification of the appellants did not reach the threshold of a positive identification as discussed above. The members of the public who arrested the appellants would, in our view, have buttressed that of ***Kerebei*** and ***Ochieng*** on the identification of the appellants. Absent that evidence, the identification of the appellants was a dock identification. [34] In ***Gabriel Kamau Njoroge -v- Republic, [1982 - 88] 1 KLR, P134***, it was stated:

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade".

(See also ***Kiarie -v- Republic, [1984] KLR 740*** and ***Ajode v Republic, [2004] 2 KLR 32)***.

[35] If the procedure outlined in ***Gabriel Njoroge's*** case (supra) had been followed immediately after the

arrest of the appellants, the value of the evidence of ***Kerebei*** and ***Ochieng*** on identification would have no doubt been enhanced.

[36] Lastly, regarding the appellant's defence, our view is that as none of the members of the public gave evidence of the alleged chase of the appellants, the appellants' version of the events cannot be said to have been ousted by the case put forward by the prosecution.

[37] We were, therefore, not surprised that ***Ms Maina*** for the Republic conceded this appeal as in our view, she properly appreciated that despite the concurrent findings of fact of both courts below, on analysis, absent the testimony of a member of the public, an important link to the case of the prosecution was brokenleaving worthless evidence of dock identification.

[38] We have said enough to show that this appeal must succeed. It is allowed, conviction quashed and sentences set aside. Each appellant is set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th day of July,2016.

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR