IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 12 OF 2014

BETWEEN

AHMED ISLAM ……APPELLANT

AND

REPUBLIC ……....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Kasango& Muya, JJ.) dated 28th November, 2013 in H.C.CR.A. No.42 of 2011)

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JUDGMENT OF THE COURT

The appellant who was convicted and sentenced to death by the Senior Resident Magistrate at Mariakani for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code has been aggrieved by the decision of the High Court (Kasango & Muya, JJ) upholding the conviction and sentence and now brings this second appeal on several grounds which we have condensed in the manner they were argued before us by his counsel, Mr. Nabwana.

We were urged to allow the appeal, quash the conviction and set aside the sentence because the evidence on record did not disclose the offence of robbery with violence as there was no motive or intention to steal from the complainant; that the incident amounted to a brawl; that since the appellant and the complainant knew each other very well, it was foolhardy and inconceivable for the former to rob the latter; and that the courts below failed to see the glaring contradictions and inconsistencies in the prosecution case which they ought to have resolved in the appellant's favour. Learned counsel identified as contradictory the evidence by the complainant that he was hit from behind yet the injuries were on the cheek, nose and arm; and that PW2 who arrived at the scene first did not say whether or not he spoke to the complainant but in his further evidence he told the court that he spoke to the complainant who told him that he had been robbed of a telephone. Other inconsistency, it was submitted, related to the date the complainant was treated, reflected in the P3 form as 31st December, 2009, yet the offence was reported on 1st January, 2010, raising the question whether the complainant was treated before he was attacked. For the reason of these contradictions, counsel urged us to ignore the evidence of PW1 and PW2 because they were unreliable. He cited **Kinuthia** v **R** (2003) KLR 55, where this Court noted that a witness must never create an impression in the mind of the court that he is not a straightforward person.

Counsel however abandoned the grounds challenging the legality of death sentence and the failure by the

trial court to give the appellant a chance to make submissions on no case to answer. The latter ground was not contained in the grounds of appeal and therefore we were not bound to consider it. The former ground on death sentence was abandoned after the Court drew the attention of learned counsel to this Court's decision in **Joseph Njuguna Mwaura & 2 others** v **R**, Criminal Appeal No.5 of 2008.

Mr. Kiprop learned counsel for the respondent urged us to dismiss the appeal for lack of merit. According to him the inconsistencies identified by learned counsel for the appellant were immaterial and could not affect the outcome reached by the trial court and confirmed by the High Court; and that all the ingredients required to prove the offence of robbery with violence, were established.

Being a second appeal we are concerned only with questions of law in terms of **section 361** of the Criminal Procedure Code. This stricture was emphasised in **James Karani M'Ikambo** v **R** (2010) I KLR 73 as follows;

> ***"..a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence."***

In our view the only broad question in this appeal is whether, from the facts, an offence under **section 296(2**) of the Penal Code was established. The offence of robbery with violence under the aforesaid provision is committed if any one of the following circumstances is proved;

> ***"(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(b) The offender is in the 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 or uses other personal violence to any person"***

See **Olouch** v **R** (1985) KLR 54. In determining whether these elements were present in the incident, we must revisit the events leading to the arrest of the appellant, being ourselves satisfied that the appellant and the complainant were known to each other.

On the night material to this appeal, the complainant got home and learnt that his daughter, Zuhura had been seen in a bar. He went to the bar, found her and directed her to go home with the mother while he (the complainant) remained behind. It is apparent that there was a fight between him and the appellant and another man called Douglas. Douglas was never arrested after he escaped. The complainant told the trial court that the appellant and Douglas attacked him after he turned down their request to be bought for alcohol. Whereas the complainant was able to explain the role played by Douglas, he gave no specific part played by the appellant in the fight. For instance he was specific that it was Douglas who kicked him until he fell down. When PW2 appeared at the scene and found the fight going on, he only asked why Douglas was beating the complainant. The complainant stated that his mobile phone, LG by make, was stolen in the process of the struggle. He did not say who in particular picked it from his pocket. But in his further evidence he told the court that the next day he called it and the call was received by Douglas who abused him. It was in cross-examination that he changed the sequence of events accusing the appellant of having held him on the ground while Douglas picked his pocket.

Similarly PW1 was specific that it was Douglas who was on top of the complainant. In cross-examination the witness gave a confused account of what happened, in answer to the appellant's question thus,

> ***"I did not see you but witnessed you struggling with him. He was down on the ground and you on him"*** (our emphasis)

This is after he had just stated that it was Douglas who was on top of the complainant.

The appellant having denied attacking and or stealing from the complainant, it fell upon the trial court to

evaluate the evidence presented before it and for the High Court to analyze afresh that evidence to see if the appellant acted in concert with Douglas in attacking the complainant and stealing his phone. On our assessment of the evidence, bearing in mind the reason why the complainant went to the bar, we think this was not a case of robbery with violence under **section 296 (2)** of the Penal Code. The fact of the appellant being with Douglas *per se* was not enough to impute common intent.

We come to the conclusion that the case against the appellant was not proved beyond any reasonable doubt and that the courts below failed in their duty to evaluate and re-evaluate the evidence before them.

The appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 1st day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

… ……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR