



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CRIMINAL APPEAL NO. 49 OF 2013**

**BETWEEN**

**ABDULRAHMAN BAKARI MAWAZO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the Judgment of the High Court of Kenya*

*at Mombasa (Odero & Muya, JJ.) dated 5<sup>th</sup> August, 2013*

*in*

*Criminal Appeal No. 247 of 2008)*

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**JUDGMENT OF THE COURT**

Although there were patrons and workers in South Guest Bar & Restaurant in Likoni area of Mombasa County, on the night of 10<sup>th</sup> March 2006 when robbers struck, only one witness was called by the prosecution. The witness, **Regina Kulala**, (PW1) who later died (death not related to the robbery), was the cashier in the bar. In her account of events she explained that two ladies and one man asked the night guard to let them in the bar for a drink. It would appear the bar had closed business for that day. No sooner had they been let in than a large group of more than ten other people stormed the bar, beating and kicking patrons as they robbed them of mobile phones and cash. It was the prosecution case that the man and the two ladies were in league with the latter group.

From the bar the gang took away cash in the sum of Kshs.8,000, wines, spirits and cigarettes. As they left they ordered PW1 and another female customer to accompany them. Because the ladies were dressed in white clothes, which could easily make them visible in the dark, they were forced to undress. They were walked in that state towards the sea and into a thicket where the party began, with the robbers consuming the looted drinks and, with force compelled the two ladies to join the party. The party was however interrupted and the robbers forced to flee when police officers stumbled upon them. The two ladies were left behind and rescued by the police officers. A few days later the appellant was arrested.

PW1 was categorical that the appellant was part of the gang; that he lived in her neighbourhood; that she

had known him both by name and appearance for a period of close to one year prior to this night; that earlier on, on the day in question the appellant had been to the bar to buy cigarettes; and that he was the only man in the company of two ladies who entered the bar first. The witness further confirmed in her testimony that she gave the appellant's name and description to the police. PW3 – **P.C. Mureithi** confirmed this fact.

**Isaack Gikara** (PW2) who was the owner of the bar testified that although he had gone home for the night, he got information of the robbery and abduction of PW1 and a female patron. **Jane Marobe**, a waitress in the bar who is alleged to have also identified the appellant during the robbery, drew the attention of PW2 that his friend, the appellant was among the robbers. Jane Marobe was, however, not called as a witness. PW2, on this score in turn alerted the police and the appellant was arrested and charged with robbery with violence contrary to **section 296(2)** of the Penal Code.

At the conclusion of the prosecution case and upon being required to defend himself, the appellant denied participating in the robbery and insisted that for no reason he was arrested while walking home from work. The trial court, however was not persuaded by that defence and instead was convinced that the appellant, with others, armed and using violence robbed PW1 of cash, assorted alcoholic drinks and cigarettes. Upon coming to that conclusion the learned magistrate convicted the appellant and sentenced him to death. The appellant's appeal to the High Court having failed, he now challenges before this Court the confirmation by that court of both his conviction and sentence.

Being a second appeal, by the provisions of **section 261** of the Criminal Procedure Code, we are limited to consider only matters of law. As was stated in the case of **Karingo v R(1982) KLR 213**, this Court will not interfere with the concurrent findings of fact by the two courts below unless the findings are not based on any evidence.

The appellant through his counsel, Mr. Obaga is contending in this appeal that the learned Judges of the High Court failed to analyse afresh the evidence on record; that the learned Judges failed to see that the evidence of identification was not free from error and was largely based on a single identifying witness; that they ought to have found that the amended charge sheet was defective; and that **section 214** of the Criminal Procedure Code which requires an amended charge to be read to an accused person was not complied with. In our own assessment of these grounds, the main grievance is that the evidence of identification was below the threshold for proving a criminal charge, a pure question of law.

**Mr. Monda**, learned counsel for the respondent opposed the appeal and submitted that the learned Judges adequately evaluated the evidence and arrived at the correct conclusion that the appellant was recognized as there was opportunity to do so by PW1, who was aided by electric light and who knew the appellant previously; that the amendment of the charge sheet was of a minor nature; and that no miscarriage of justice was occasioned by the failure to call upon him to plead afresh to the amended charge sheet.

The following well-settled principles apply to this appeal. It is the duty of the prosecution and not the suspect to prove the criminal allegations brought against him. The standard of proof to be discharged is one that goes beyond any reasonable doubt. See **David Muturi Kamau v R (Nbi) Criminal Appeal No. 99 of 2014**. A conviction can be based on the evidence of a single witness on identification/recognition. However before a court can rely on such evidence to convict, it must be satisfied that the prevailing conditions at the scene of crime were such that there was no possibility of an error. See **Maitanyi v R (1986) KLR 198**. Recognition of a person known to a witness prior to the date of a crime is more assuring than identification of a stranger. See **Anjononi & others v R (1976–1978) KLR 1566**. The court will give credence to the evidence of recognition if it shows that the witness was able to give the name and/or description of the suspect immediately after the incidence to a third party. See **Ajode v R (2004) 2 KLR 81**.

Applying these principles to this appeal, the two courts below made concurrent factual findings that although the robbery was at night, the circumstances and prevailing conditions were such that PW1 could not have mistaken the identity of the appellant; that there was light in the bar; that the appellant was known to PW1 before this occasion; that he had earlier on in the day been to the bar to buy cigarettes; and

that he spent considerable period of time with PW1 after the latter's abduction. Nothing has been placed before us to warrant our interference with those findings. PW1 specifically and repeatedly stated that with the help of electricity light she was able to see the appellant who had been a neighbour for nearly one year. She gave his name to the police officer who recorded her statement shortly after they were rescued. Her evidence of recognition was simply overwhelming. The learned Judges, with respect, adequately analysed the entire evidence and after re-evaluating it found the offence of robbery with violence to have been proved against the appellant. They were alive to the requirement that evidence of identification by a single witness must be subjected to close scrutiny, especially if the conditions for positive identification are believed to have been difficult. The learned Judges, in this connection cited the famous **Abdallah Bin Wendo & Another v R (1953) 20 E.A.C.A 166.**

The appellant has further alleged that **section 214** of the Criminal Procedure Code was violated, in that when the prosecution applied and the court allowed the charge sheet to be amended, it was not read over afresh to the appellant; that although the charge sheet named PW1, (Regina Kulala) as the owner of the stolen items, the evidence tendered revealed that the true owner was **Isaack Gikara, PW2.**

Section 214 aforesaid provides that:-

***“214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***

***Provided that –***

***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***

***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination. “***

Although the court was required but failed to ask the appellant to plead afresh to the amended charge sheet, in the circumstances of this case, we find that no prejudice was occasioned. The prosecution applied to amend the charge sheet merely to substitute the name of Isaac Gikara with that of Regina Kulala as the complainant. To that application the appellant unequivocally stated that he had no objection. The appellant was aware of the nature and tenure of the amendment. In terms of **section 268(2)** of Penal Code PW1 was the special owner of the stolen items. The case against the appellant was proved beyond any reasonable doubt and his *alibi* defence displaced.

For these reasons, all the three grounds argued before us must fail. The appeal, in the same breath fails and is accordingly dismissed.

**Dated and delivered at Malindi this 30<sup>th</sup> day of September, 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**