IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 222 OF 2010

BETWEEN

DUNCAN MWEMA.....……..…….APPELLANT

AND

REPUBLIC.……..……..……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala and Odero, JJ.) dated 27th May 2010

in

H.C.CR.A. No. 55 of 2006)

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JUDGMENT OF THE COURT

The appellant, ***Duncan Mwema***, was charged jointly with ***Bilan Aginga Nyataya (the deceased)*** before the Chief Magistrate's Court at Mombasa, with the offence of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code***. It was alleged that on 31st August 2004 at Mwandoni area in Mombasa, jointly with others not before the court and while armed with *pangas*, they robbed ***David Muturia Mutuma*** of a mobile phone, a wallet, an identity card and Kshs 10,250/- and immediately before or immediately after the time of the robbery, used actual violence on him.

On 26th January 2006, the Senior Resident Magistrate, after being satisfied that both the appellant and the deceased were positively identified while committing the offence, convicted and sentenced them to death. ***Azangalala, J.*** *(as he then was)* and ***Odero, J***. dismissed their first appeal in the High Court on 27th May 2010, precipitating this appeal by the appellant alone because his co accused, the deceased, died during the pendency of the appeal in the High Court.

The evidence adduced by 8 prosecution witnesses and upon which the appellant was convicted was briefly as follows. On the material day at about 5.00 am, ***Daniel Muturia Mutuma (PW1),*** was walking from his house at Bakarani to the stage to take a *matatu* to work in Kongowea. After walking a short distance, he was accosted by the appellant and the deceased who were in the company of others, armed with *pangas.* The two ordered PW1 to stop, which he duly did, standing right below a street security light. Immediately, they set upon him, cutting him on the hand and head. PW1 attempted to flee, but

overwhelmed by his injuries he fell against the door of the house of ***Beatrice Muthoni (PW2),*** which was also lit by a security light. His assailants continued to cut him before stealing from him the property specified above and eventually taking flight. His neighbours subsequently helped him to the hospital from where he informed the police that the appellant and the deceased, whom he knew, were among the robbers.

Thereafter the appellant and the deceased were arrested. A search of the appellant's house unearthed a *panga* and a black leather jacket that prosecution witnesses testified was similar to that worn by the appellant during the robbery. On 8th September 2004, the two were charged with the offence as aforesaid and pleaded not guilty.

Other than PW1 and PW2, ***Charity Ivoki (PW3),*** another neighbour of PW1, testified that she knew the appellant and the deceased before the robbery; that they lived in the same neighbourhood; and that from her house, which was about three meters away, she saw them robbing PW1. The other relevant evidence adduced at the trial was that of ***Doctor S. Swaleh (PW6)*** who produced the P3 form in respect of the appellant prepared by ***Dr. Said O. Said*** and dated 3rd September 2004. The P3 form showed that PW1 suffered a deep cut wound on the left parietal region; a depressed skull fracture and cuts in the middle chest and right thumb. The Doctor classified the injuries as harm and expressed the opinion that they were probably inflicted by a sharp object.

In his unsworn defence, the appellant stated that he was a member of a local vigilante group *(Sungu Sungu)* and that on the material day he was on duty from 10 pm until the next day, when he went home and slept. At 11.00 am he learnt from his relatives of a robbery that had taken place in the neighbourhood and he proceeded to the office of the chief to find out the details. Later at 4.00 pm he was apprehended. His house was searched and a *panga* and other items were recovered. Subsequently he was charged with the offence. It was his evidence that he did not commit the offence.

The appellant's appeal before this Court, as prosecuted by his learned counsel, ***Mr. Ngumbau*** is based on two grounds, which he argued globally, challenging the appellant's identification as unreliable and unsafe and contending that his arrest was based on mere allegation and was not connected to the commission of the offence. Counsel submitted that according to the evidence of ***James Njue (PW4)*** the victim of the robbery was a ***Mr. Kariuki*** rather than PW1 and that it was PW4 who organized a group, which arrested the appellant and took him to Nyali Police Station. It was submitted that the appellant was arrested before PW1 made his report to the police and therefore there was no connection between the appellant and the robbery committed against the PW1.

On identification of the appellant, it was submitted that the first appellate court failed to consider the possibility that he was arrested merely because he belonged to the *Sungu Sungu* group. Counsel submitted that none of the prosecution witnesses referred to the appellant by name, contending that they did so merely by reference to his nickname and membership of the *Sungu Sungu.* On the black leather jacket and *panga* that were recovered from the appellant's house, it was submitted that from the evidence on record, a person by the name of ***Dalmas Ngumbau*** was also arrested from the same house and that those items could well have belonged to him as they were not peculiar. Accordingly counsel urged us to find that the conviction was unsafe and to quash it and set aside the sentence.

Mr. Monda, learned ***Assistant Director of Public Prosecutions,*** opposed the appeal submitting that the appellant's identification was watertight and safe. The appellant himself, it was contended, admitted in his unsworn defence that the jacket and the panga were recovered from his house and did not suggest that they belonged to Dalmas Ngumbau. Counsel further submitted that the High Court was alive to its duty as the first appellate court and even quoted ***Ajode v. Republic [1982] KLR 82*** regarding its duty to re-evaluate the evidence exhaustively and come to its own independent conclusion. In the same vein, it was urged, the first appellate court was alive to the danger of relying on the evidence of identification under difficult circumstances, but was satisfied that it was dealing with evidence of recognition. In addition, it was submitted that the court duly found that the recognition of the appellant was not by a single witness and that it appropriately addressed the prevailing lighting with the aid of which the witnesses were able to recognise the appellant. We were urged to affirm the concurrent findings of the two courts below and to

dismiss the appeal.

By dint of ***section 361*** of the ***Criminal Procedure Code***, a second appeal like the one before us is confined to consideration of issues of law only. On issues of fact, this Court will pay homage to the concurrent findings of the two courts below, unless it is demonstrated that there was no evidence at all upon which such findings were based or that the evidence relied upon was of such a nature that no reasonable tribunal, properly addressing its mind on it, could have made such findings. (See ***Boniface Kamande & 2 Others v. Republic, Cr. App. No. 166 of 2004).*** In ***M'Riungu v. Republic [1983] KLR 455,*** the principle was expressed thus:

> ***"where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".***

We are satisfied that the central question in this appeal, namely the appellant's identification is a question of law and that this appeal is therefore properly before us. It has long been accepted that because people are prone to making mistakes in identifying others, even those that they know very well, a trial court must accept evidence of identification with great care and caution and in particular if that evidence is by a single witness and under difficult circumstances. This concern was articulated thus in ***Joseph Ngumbao Nzoro v. Republic [1991] 2 KLR 212***

> ***"Before accepting visual identification as a basis for a conviction, the court had the duty to warn itself of the inherent danger of such evidence. A careful direction regarding condition prevailing at the time of identification and the length of time the witness had the accused under observation together with the need to exclude the possibility of error was essential."***

Nevertheless, it is apt to point out too that in matters of identification, recognition of the accused person by the witness is deemed to be more assuring and reliable than the visual identification of the accused by a total stranger because it is based on the witness's familiarity and personal knowledge of the accused. (See ***Anjononi & Others v. Republic [1976-80] 1 KLR 1566).***

In this appeal, the offence was committed at about 5.00 am in the morning. The evidence of PW1, which the trial and the first appellate courts accepted was that when he was ordered by the appellant and the deceased to stop, he did so right below a streetlight whose light enabled him to identify the appellant among the robbers. The appellant was not disguised; the witness was able to describe in detail the role played by each accused person in the robbery; and the appellant's mode of dress. When the attack continued at PW2's door, the evidence too was that the place was well lit with security lights, which enabled PW2 and PW3 from a short distance in their houses to recognize the appellant and his accomplice as they robbed PW1 armed with *pangas*.

All the three witnesses testified that they knew the appellant and deceased before the day of the robbery. According to PW1 the two lived in the neighbourhood; regularly played football in a neighbourhood pitch; and chewed *miraa* at a kiosk near his house. Specifically as against the appellant, PW1 testified that he knew him by his nickname of Osama; that he attended the same prayer meeting with the appellant's mother; and that during the robbery, which took about 20 minutes, the appellant was wearing a black leather jacket. PW2 testified too that she knew the appellant because he lived in her neighbourhood; that she knew the appellant as Osama; and that at the time of the robbery he was wearing a black leather jacket. Lastly, the evidence of PW3 was that not only were the appellant and the deceased her neighbours, but that she even knew their houses. She was firm that she had known the appellant for more than one year before the robbery and that at the material time he was wearing a black leather jacket.

From the above evidence, the appellant was identified, not by a single witness, but by three different witnesses who knew him well before the robbery. He was not disguised during the robbery, which took a considerable time as they cut the appellant, struggled with him to PW2's door and ransacked his pockets.

The evidence of those witnesses was evidence of recognition, not identification by strangers. The lighting condition was specifically considered by the two courts below and found to be conducive to positive identification or recognition. The two courts were also alive to their duty of accepting the evidence of identification or recognition with caution and circumspection.

In their defences, the appellant and the deceased confirmed that indeed they were members of the *Sungu Sungu.* The appellant too admitted that a black leather jacket was recovered from his house together with a *panga*, the day after the robbery. In our view, in the face of the above overwhelming evidence, nothing turns on the evidence of PW4 that the victim of the robbery was a Mr. Kariuki. That aspect of his evidence was pure hearsay as he was narrating what he had been told by undisclosed people.

We have ultimately come to the conclusion that the appellant's identification by recognition was safe and that we have no basis for interfering with the conviction and the sentence. Accordingly, we have no option but to dismiss this appeal in its entirety. It is so ordered.

Dated and delivered at Malindi this 30th 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