IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 99 OF 2014

BETWEEN

HAMISI SHEE MWADZIMEZA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High of Court of Kenya at Mombasa (Odero & Muya, JJ.) dated 18th February, 2014

in

H.C.CRA. No. 12 of 2012.)

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JUDGMENT OF THE COURT

Kassim Shee (*PW1*), the complainant in the criminal case that has led to this appeal was a boda boda operator in Diani, Kwale County. On 13th December, 2009 at about 9 p.m., whilst in the course of his business at Ibiza stage, he was approached by a customer who wished to be ferried to Corner ya Musa. On getting to Corner ya Musa, the pillion passenger requested that he be dropped further down the road at a mosque. At the mosque, he again requested the complainant to drop him across the road near a house. As he applied brakes next to the house, the pillion passenger suddenly and using a bicycle chain strangled him. The complainant fought back and was able to pull it off his neck. Immediately five other people joined the fray. Apparently, they had been strategically positioned. He was immediately cut with a panga on the forehead and on the back. One of the attackers pierced his left thigh with a spear and one of them cut him on the chest and he fell down unconscious. Believing that the complainant was dead, the attackers then left with his motor cycle. The complainant was however able to crawl to a nearby home where he sought help. He was rushed to Msambweni District Hospital by **Mohamed Said Faraj** *(*PW 2*)* and **Hamisi Omar Kwakutwaa** (PW 3) and later transferred to Coast General Hospital where he was admitted for almost a month.

During the attack, he had seen the appellant in the vicinity. He is his step-brother and as he was being attacked, he saw him approach but for unexplained reason(s), stopped, turned and walked away. When he came to in hospital, he mentioned to his fellow boda boda operators the involvement of the appellant in the attack. The boda boda operators led by **Mohamed Abdul Shilumbo** (*PW 4*) apprehended the

appellant who upon interrogation implicated, another step brother of both the appellant and the complainant, one **Hamisi Shee Mwadzimeza**. Both the appellant and Hamisi Shee Mwadzimeza could have been lynched by these boda boda operators during the arrest but for the intervention of **Corporal Morris Koome** (*PW 5*), who shot severally in the air to disperse them. They had already poured petrol on them ready to set them ablaze. After the boda boda operators scampered in different directions, PW 5 rescued the duo, put them in the police vehicle and took them to Diani Police Station.

Allan Cherop (*PW 6*), a clinical officer at Msambweni District Hospital was detailed by the investigating officer, **P.C Paul Kabochi** (*PW 7*) to examine the complainant and compile a P3 Form. Upon examination, he noted multiple deep cut wounds on the head, penetrating deep chest injury wounds with fracture of the sternum and deep cuts on the back and left thigh of the complainant. He assessed the degree of injury as grievous harm and the probable type of weapon causing the injuries as sharp.

The stolen motor cycle was never recovered. Nevertheless, following further investigations the appellant and his step-brother aforesaid were subsequently arraigned before the Principal Magistrate's Court at Kwale on 26th January, 2010 on one count of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars being that the two, on 13th December, 2009 at Taoba Village, Diani Location of Kwale County, jointly with others not before court whilst armed with dangerous weapons namely pangas, robbed the complainant of a motor bike make Haojin valued at Kshs.82,000/= and immediately before or after the time of the robbery used actual violence on the complainant.

The two entered a plea of not guilty and their trial ensued. Upon the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. His co-accused was however acquitted for lack of evidence under **Section 210** of the Criminal Procedure Code.

Defending himself, the appellant through a sworn statement of defence, denied committing the alleged offence and claimed that he was arrested for no apparent reason. The only reason he could conjure up for the arrest was a land dispute he had with the complainant. That the complainant had attempted to sell the family land whilst he was in prison and towards this endeavour, he had even forged his signature. Because of his resistance to the transaction, the complainant had no choice but to frame him with the case.

Upon conclusion of the trial, the appellant was found guilty of the offence, convicted and sentenced to death. He was dissatisfied with the conviction and sentence and hence preferred an appeal to the High Court in Mombasa. In a judgment dated 18th February, 2014, **Odero** and **Muya, JJ**. dismissed the appeal thus precipitating the appeal before us.

When the appeal first came before us for plenary hearing, **Ms Chala** and **Mr. Yamina**, learned counsel for the appellant and the respondent respectively agreed to canvass it by way of written submissions. They subsequently filed their respective written submissions together with authorities that we have carefully read and considered. From the respective written submissions, two issues stand out for consideration; recognition evidence relied upon to convict the appellant, and failure by the High Court in its statutory duty to reconsider the evidence afresh, evaluate it and reach its own independent conclusions.

In support thereof, counsel for the appellant submitted that the recognition evidence relied upon to convict the appellant was that of the complainant only. However, the evidence was full of inconsistencies, contradictions and errors which taken as a whole could not have sustained a conviction. The contradictions consisted of the number of people involved in the attack and how they emerged, whether the appellant was among the attackers, whether or not he saw the appellant and if he did whether it was before, during or after he had been struck on the face with a panga and was bleeding profusely. The appellant further submitted that the two courts below did not put to proper test the circumstances of the recognition. There was no inquiry as to the presence of the light, its size, brightness and position in relation to the appellant. That the complainant was under vicious attack and if his face was covered in blood, he could not have been able to see and recognize the appellant. Concluding her submissions, counsel observed that had the High Court properly performed its duty as a first appellate court by reconsidering and re-evaluating the evidence tendered before the trial court, it would have noticed the

above contradictions and would have reached a different conclusion from that of the trial court. According to counsel, the High Court merely affirmed what the trial court had said which was an error on its part.

In opposing the appeal, learned counsel for the respondent submitted that the High Court appreciated that the trial court had found the complainant a truthful witness and that he was testifying against the appellant who was his step-brother. He could not therefore have mistaken him for another person. Regarding the alleged grudge, it was submitted that the trial court considered the evidence in this regard which was re-evaluated by the High Court and both courts came to concurrent conclusion that the defence was not available to the appellant. On contradictions, it was submitted that they were not so material as have warranted the High Court to interfere with the decision of the trial court.

This being a second appeal, by dint of **Section 361** of the Criminal Procedure Code, this Court's jurisdiction is limited to delving into matters of law only. See **Karingo v Republic [1982] KLR 213**. This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision. See **M'Riungu v Republic [1983] KLR 455**. It is against this background that we must ponder this appeal. We have no doubt that the two issues canvassed by the appellant are both issues of law.

The appellant was convicted on the evidence of recognition by a single witness, the complainant. It is settled principle of law that evidence of identification and or recognition in criminal cases can cause miscarriage of justice if not carefully tested, more so where conditions obtaining at the scene at the time of the alleged identification/recognition are difficult. Hence the need for the trial court and the first appellate court to test with the greatest care such evidence. The court must also bear in mind that though the evidence of recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or another, nonetheless the court must caution itself of the fact that a witness can as well be mistaken for it is not unusual for a witness to fail to recognize a relative even during the day and that a mistaken witness can be convincing. See **R vs Turnbull & other [1976] 3ALL ER 549, Anjononi v Republic [1980] KLR 59, Maitanyi v Republic [1986] KLR 198** and **Naftali Mwenda Mutua v Republic [2015] eKLR**.

The complainant testified that he knew the appellant prior to the incident as he was his step-brother and was able to recognize him on the material day. However, his evidence is infested with lots of discrepancies and contradictions which should have invited the trial court to carefully test it. From the various versions advanced by the complainant regarding his recognition of the appellant in his evidence in chief, cross-examination and when he was recalled for further cross-examination, it is difficult to say with certainty or precision whether the complainant was able to see the appellant sufficiently or at all as to recognize him. In his evidence in chief he stated:-

> **"I managed to pull the chain over my head. I looked and saw three people on one side two on the other. The ones on my left hand side then attacked me on the forehead with a panga. I looked again and saw the 1st accused as he crossed just 5 metres away. When he saw I had spotted him he stopped. He was rushing towards me."**

On cross-examination, PW 1 indicated to the court that he saw the appellant after he was cut on the forehead. He stated "***I saw you after I was cut on the forehead***." However, when he was recalled he changed the story somewhat and stated as follows: "***I saw you at the scene just before I was cut on my forehead***." All these narratives of how he was able to recognize the appellant are certainly inconsistent and contradictory. These are material and not minor contradictions and or inconsistences.

The offence was committed at night, between 8.45 and 9 p.m. to be precise. The question that arises then is how was the complainant able to see and recognize the appellant. According to the complainant, the security lights on the house where they had stopped assisted him to see the appellant. As already stated, such evidence requires careful testing. So how is the careful testing undertaken? The Court should ordinarily examine closely the circumstances under which the recognition came to be made, for instance

how long the witnesses had the appellant under observation, at what distance, in what light if it was at night, its size, brightness and its position relative to the appellant. As stated in the case of **Maitanyi** (supra):-

> **"The strange fact is that many witnesses do not properly identify another person even in daylight….It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into"** (**See also** Wanjohi & Others v Republic [1989] KLR 415**.**)

From the record, it is evident that the trial court failed to conduct any inquiry as to the sort of light, its size and its position relative to the suspect. PW 1 just indicated that there was security light at the scene. That fact again did not even feature in his written statement tendered in evidence. Was the said light at the gate, or on the roadside or inside the compound? What position was the light relative to the appellant? Was it behind him, in front of him and or was the appellant underneath it and at what distance? How long for instance, did PW 1 have the appellant under observation considering that he was under vicious attack having been cut on the forehead with blood oozing and covering his face and worst still PW 1 indicated in his statement and testimony that the appellant was wearing a cap on his head? Certainly with a cap on and at night, recognition and or identification of a person in those circumstances cannot be a walk in the park. These concerns ought, but were not inquired into, yet it was very necessary to do so noting that the evidence of PW 1 was not coherent, and indeed was the only evidence on that aspect. The trial court may have determined that the complainant was a truthful witness, but given what we have pointed out above, we doubt whether that conclusion was justified or was he simply honest but mistaken?

Initially, the complainant claimed to have seen the appellant close to him. Later he changed the narrative and suggested that he saw the appellant approach him five metres away but failed to indicate from which direction. Later he is recorded as saying that he saw the appellant from the main gate and lastly he is recorded as saying that he saw the appellant emerge at the corner. This begs the question; which corner and how far was it from the light?

In **Maitanyi** (supra), the Court revisited the issue of identification by a single witness and held as follows:-

> **"The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decisions, it must do so when the evidence is being considered and before the decision is made.**
>
> **Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."**

In the case of **Naftali Mwenda Mutua** (supra), the Court held that:-

> **"It is our considered view that the trial court and the first appellate court erred in not "***testing with the greatest care***" the evidence of PW1 in respect of the alleged identification and/or recognition. Suffice to state that failure to do so, left glaring omissions, which raise doubts as to the culpability of the appellant and his conviction may not be safe."**

In this case, both courts below did not even bother to warn themselves of the danger of relying on the evidence of a single witness on identification to found a conviction. Further and as we have attempted to demonstrate, both courts failed to undertake an inquiry of careful testing of such evidence.

In our view, it was not safe for the trial court to purely rely on the second narrative of PW 1 in isolation of the other two versions without subjecting the evidence to further inquiry as required in law and it was not safe for the trial court to rely on the demeanour of PW 1 when his evidence was so inconsistent and contradictory that it created doubts as to whether he really was in position to see and positively identify the appellant.

The complainant is also on record as saying that the appellant did not physically attack him. His complaint appears to be that the appellant saw him being attacked and did nothing. He did not come to his aid. Instead, he walked away. The appellant's conduct aforesaid if at all, cannot be the basis of criminal culpability. We are not sure whether that conduct of the appellant if at all he was at scene of crime could *per se* attract the inference that he was part of the gang as the two court's below held. He could have been at the scene on his own errands, he could have seen the complainant being attacked and wished not be involved further, given the estranged relationship between the two, he could as well have been less bothered with what was going on.

The two courts reached concurrent findings that the appellant was easily recognized by the complainant as they were step-brothers. However, considering what we have pointed out, we do not think that the concurrent findings are supportable. A tribunal properly directing itself to the issues we have raised could not have reached the determination that the complainant recognized the appellant.

It is trite law that it is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there is some evidence to support the trial court's findings and conclusions. It is discernible from the record that the High Court failed to properly re-evaluate the evidence and draw its own conclusions in deciding whether the judgment of the trial court should be upheld or not. The High Court merely summarized the facts of the case and findings of the trial court and concurred with the said findings without subjecting the evidence to fresh and exhaustive scrutiny. The result is that the gaps found in the evidence of recognition going by the contradictions and inconsistences as well as various narratives was not resolved. Certainly, they ought to have been resolved in favour of the appellant. That failure occasioned the appellant prejudice.

It is in view of the above that we have come to the conclusion that the trial court and the first appellate court failed to carefully test the evidence, re-evaluate and analyse the same afresh, for had it done so, the High Court would have come to the conclusion that the evidence did not safely support the conviction of the appellant on the offence charged.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The appellant is set forthwith at liberty, unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 14th day of October, 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