IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 22 OF 2014

BETWEEN

MOHAMED ALI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

(Odero & Muya, JJ.) dated 30th October, 2013

in

H.C.CR. APP. No. 2 of 2010)

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JUDGMENT OF THE COURT

Although the appeal has been conceded by the State, this Court must nonetheless satisfy itself on the grounds upon which the appeal was brought and those on which the concession is made. See **Samuel Kimenju Mbuthi v R,** Cr. Appeal No. 44 of 2014. In the same breath we bear in mind our primary role on a second appeal, which by **section 361** of the Criminal Procedure Code requires that only matters of law raised in the appeal are considered. See **Mohammed Famau Bakari v. R [2016] eKLR**.

The appellant's first appeal to the High Court having been dismissed and his conviction and death sentence for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code confirmed, he now brings this second appeal on three broad grounds. The appellant first contends that the evidence of recognition or identification upon which the conviction was based was not free from the possibility of error; secondly, that two vital witnesses were not called by the prosecution; and finally, that his defence was not given due consideration.

In order to appreciate these grounds and our ultimate decision, the following brief background is necessary. PW1, **Moffat Webster Mochama**, in the company of his wife **Damaris Kwamboka** were on their way to inspect a house to which they intended to relocate when they were accosted by six young men armed with knives and who introduced themselves as members of a community policing group in the area (*sungu sungu*). In the process of conducting a body search on PW1 and his wife, the group stole cash and mobile phones. The robbery occurred at about 8.30 a.m. After robbing the couple, the gang

ordered them to walk back threatening to "***expose their intestines"***. From the scene, the couple went to the offices of the *sungu sungu* group where they saw one of their attackers, (not the appellant) but feared to tell the man in-charge so as to avoid harm to themselves. The man in-charge, however insisted that he suspected the attackers to be members of a notorious criminal gang known as *Mateche* and not his *sungu sungu* group. On that score PW1 in the company of members of *sungu sungu*, including the one robber he had identified, and members of the public, went to a certain quarry where they found the appellant consuming alcohol in a group of other people. When the leader of *sungu sungu* called the group, all except the appellant responded. PW1 testified that once again being scared for his life he did not point out the appellant as one of those who had robbed them that morning.

When it became clear to PW1 that he was headed nowhere complaining to the *sungu sungu* group leader, he decided to report the matter to the police the next day. In the company of two police officers, PW1 returned to the scene of the robbery once more, he saw the appellant and another man seated outside a house and pointed them out to the police. Both were arrested but the latter was shortly set free while the appellant was detained. PW1 went further and pointed out the other member of *sungu sungu* who he had identified earlier but unfortunately he ran away and disappeared. The appellant was then charged with two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code as explained earlier. He was, however acquitted of the second count since PW1's wife who was the complainant in that count did not testify.

At the trial only PW1 and the arresting officer testified. From that evidence the trial court found that PW1 was consistent in his evidence that he had positively identified the appellant. Upon conviction, the appellant was sentenced to death. The High Court in upholding both the conviction and sentence, observed that the only evidence linking the appellant was that of a single eye witness; that, since the incident took place at 8.30 a.m. and PW1 having spent considerable period of time with the appellant, the identification was free of any error; that, because of these factors PW1 was able to describe the role played by the appellant during the robbery, namely that he had a knife, and was the person who, after the robbery handed over both the money and the phone to the gang leader; that the appellant was known to PW1 by appearance; that the appellant was not masked; and that he was able to point the appellant out to the police a couple of days later. The court concluded that the offence of robbery with violence against the appellant was proved beyond any reasonable doubt and rejected the appellant's defence.

Before us, **Mr. Ngumbau,** learned counsel for the appellant urged us to find that the evidence of identification by recognition was unreliable and that the two courts below failed to test that evidence with circumspection; that without identification parade, it was unsafe to rely on the evidence presented by PW1. Counsel further submitted that had the learned Judges of the High Court analysed the evidence before them, they would have rejected it as unreliable evidence of a single witness that both the trial and the first appellate courts unfairly rejected the appellant's defence.

In conceding the appeal, **Mr. Yamina,** learned counsel for the respondent submitted that the evidence of recognition was weak and not tested. For example, counsel argued, it was important to call the first person, the charcoal seller, to whom PW1 and his wife went and reported the robbery. It was equally essential, he added, to call PW1's wife and the leader of *sungu sungu* group who had accompanied PW1 to the quarry where the appellant and others were allegedly found consuming alcohol.

We reiterate that this appeal, no doubt, raises matters of law. But central to the decision of the two courts below and in this appeal, is the question of identification. Because of the inherent dangers associated with identification of suspects in criminal proceedings by one witness, courts have over the years developed safeguards to ensure innocent people are not punished for crimes they have not committed. For instance, in the time-honoured decision of the Court of Appeal for East Africa in **Abdalla Bin Wendo& Another v Reg. (1953) 20 E.A.C.A166** the following safeguards, so often repeated and yet bear repeating, were enunciated;

> ***"Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions***

favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilty, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

The other, but related safeguard was explained in **Simiyu & Another v R (2005) 1 KLR 192** as follows:

"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given".

See also**R v Turnbull (1976) 3 ALL ER 549**.

For the reason that evidence of visual identification in criminal cases can bring about miscarriage of justice, the trial and the first appellate courts are bound to examine such evidence carefully in order to minimize this danger. PW1 was the sole eye witness. According to him they were robbed by a group of six young men, three of whom were armed with knives. Although the robbery was in the morning, at 8.30 a.m., PW1 was not clear on the question of identification. First he stated that he knew all the six by appearance because he used to see them in the estate where he lived; that it was the robbers who introduced themselves as members of a vigilante group, *sungu sungu*; that when they were taken to the offices of *sungu sungu* group he only saw one of the attackers who was not the appellant; that because he was scared, he did not point him out. PW1 further stated that he informed the person in-charge of the vigilante group that he could identify those who robbed them, but failed to point out the one who was present at the time and even accompanied them to the quarry. The only time PW1 purported to link the appellant with the robbery was at the quarry where they found the appellant ***"celebrating with some alcohol"***. When the person in-charge of the vigilante group called those who were with the appellant they all responded and went to where they were being called, but the appellant refused to do so; that while this was happening the person they had identified earlier and who was present at this time ***"unwound his whip and looked"*** at them menacingly as a result of which;

"My wife then warned me not to point at the accused at that time as I could be harmed."

Two days later PW1 purported to identify the appellant to the police who proceeded to arrest him.

From this account of events, it is clear to us that, if indeed PW1 knew the appellant, by appearance prior to the date of the robbery, nothing stopped him from categorically saying so and pointing him out to the leader of the vigilante group. His conduct appears to answer to the description of Macmillan LJ, of "*people who are, by nature, unduly timorous and who imagine every path is beset by lions"*. See **Glasgow Corporation v. Muir [**1943] 2 ALL ER 44. Indeed, his conduct throughout the three days of searching for the robbers leaves us in no doubt that he was engaged in a fishing expedition; and that the only thing that led him to link the appellant with the robbery was the fact that he did not respond when he was called by the leader of the vigilante group, and that he appeared to have been celebrating, drinking alcohol. It is as confounding as is perplexing that in cross-examination, PW1 stated that he did not know the appellant before the incident. He further claimed that he gave the appellant's description to the police. The only police officer who testified as we have observed was the arresting officer, who did not confirm that, as they set out to look for the robbers, he had the appellant's description. This was, in our opinion, a case of suspicion. That is not the threshold expected in a criminal trial. With respect, learned counsel for the respondent, properly conceded this appeal.

In the result the appeal is allowed. The appellant shall be set at liberty forthwith unless 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