IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NOS. 19 & 20 OF 2015 (CONSOLIDATED)

BETWEEN

SIRYA MASHA MWANGO'MBE..……………FIRST APPELLANT

SALIM ABRAHAM LIWALI........................SECOND APPELLANT

AND

REPUBLIC..………………………..…………..………RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Odero and Muya, JJ.) dated 13th November 2014

in

H.C.CR.A. No. 260 of 2010)

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JUDGMENT OF THE COURT

On 13th May 2010, the Chief Magistrate's Court at Mombasa convicted the two appellants, ***Sirya Masha Mwang'ombe*** and ***Salim Abraham Liwali,*** of the offence of robbery with violence contrary to section ***296(2)*** of the ***Penal Code*** and sentenced them to death. Their first appeal to the High Court ***(Odero and Muya, JJ.)*** was dismissed on 13th November 2014. They now bring this second appeal before this Court, which by dint of ***section 361(1)*** of the ***Criminal Procedure Code*** is confined to questions of law only.

The appellants challenge the judgment of the High Court on two grounds contending, firstly, that their identification as the perpetrators of the offence was unsafe and, secondly, that the High Court failed in its duty, as the first appellate court, to exhaustively re-evaluate and reappraise the evidence adduced before the trial court. We are satisfied that the two grounds relied upon by the appellants in this appeal raise questions of law that call for our determination.

The particulars of the charge against the appellants were that on 14th November 2008, at Kingeleni Lights along the Mombasa-Malindi Road, jointly with others not before the court, and while armed with dangerous weapons, to wit pistols, they robbed ***Elijah Buuri Wandeto (the complainant)*** of Isuzu Pickup Motor Vehicle Registration No. KBD 638G, Motorolla cellphone, shirt, belt and driving license, all valued at Kshs 1, 672,000 and at or immediately before or immediately after the time of such robbery

threatened to use actual violence on the complainant.

The appellants were convicted on the basis of evidence adduced by 10 prosecution witnesses. In summary the thrust of that evidence is that on the material day at about 3.00 pm, the 2nd appellant, ***Salim Abraham Liwali,*** approached the complainant, a transporter, at Kengeleni Lights, and hired him to transport some goods from Kilifi to Kengeleni. They agreed on a fare of Kshs 4,000/- and to start their journey at 6.00 pm, after which the 2nd appellant left. He returned as agreed at 6.00 pm and the two proceeded to Mtwapa where they fueled the vehicle and were joined by a friend of the 2nd appellants before proceeding to Kilifi.

In Kilifi, they were joined in the vehicle by the 1st appellant, ***Sirya Masha Mwango'mbe,*** whom the 2nd appellant claimed was going to show them the goods to be transported. Upon being informed that the goods were at Chumani, the complainant demanded a further Kshs 1,000/-, which the appellants agreed to pay. On the way to Chumani the appellants requested the complaint to stop the vehicle so that they could relieve themselves. All four alighted from the vehicle and proceeded to relieve themselves, but as they were getting back into the vehicle, the 1st appellant produced a pistol and ordered the complainant to surrender the motor vehicle, which he did without any resistance.

Soon thereafter the appellants blindfold the complaint with his shirt, drove him to a forest and left after tying him to a tree. The complainant managed to free himself and found his way to ***Loka Police Post*** from where he called his brother for help. The latter picked him up and drove him to ***Kilifi Police Station*** where he reported the robbery.

Some six days later, on 20th November 2008, police on patrol found the stolen motor vehicle abandoned near Soweto Bar in Malindi. It was vandalized with the tyres, radio, battery and tarpaulin missing. The 1st appellant was arrested and upon searching his house, the police recovered the complainant's phone, shirt, belt and the tarpaulin. The 2nd appellant was arrested subsequently and the complainant identified both appellants in an identification parade before they were charged with the offence.

Put on their defence, the two appellants gave sworn evidence and denied any involvement in the offence. The 1st appellant stated that he was a beach boy and that on 20th November 2008 at about 9.15 pm, he was drinking palm wine at bar when, together with the palm wine seller, they were arrested by the police. The reason for his arrest was drinking palm wine. He was locked up at the police station and was later subjected to an identification parade. He could not remember where he was on the date of the robbery, but he suspected that he was on the beach. He also denied that the recovered property was found in his possession.

As for the 2nd appellant, his defence was that he was a greengrocer and that on 24th November 2008 he was on his way, on a motorcycle, to deliver tomatoes to a hotel in Malindi. He was flagged down by a customer and questioned about the motorcycle he was riding, after which he was arrested. At the police station he was interrogated regarding theft of a motor vehicle, which he knew nothing about and subsequently charged in court.

It is patently clear that the identification of the appellants was by a single witness, namely, the complainant. The assurance given by the doctrine of recent possession that the identification of the 1st appellant was safe, after he was found in possession of property that was recently stolen from the complainant, literally evaporated when on the first appeal, the High Court discounted that evidence, holding that the property was not properly identified as that of the complainant. This appeal therefore turns primarily on the question whether the identification of the appellants by a single witness was, in the circumstances of this case, safe.

Arguing the appellants' appeal, ***Ms. Otieno,*** learned counsel submitted that the identification of the appellants was by a single witness under difficult circumstances and was therefore unsafe. Counsel contended that the complainant had not described the appellants to the police at the earliest opportunity

and that having been the driver of the motor vehicle, who was expected to be concentrating on the task of driving, he did not have the opportunity to observe the appellants properly. It was counsel's further submission that both courts below failed to inquire into the source and intensity of the light on the basis of which the complainant identified the appellants. The judgments of this Court in ***Maitanyi v. Republic* [1986] KLR 198, *Wamunga v. Republic* [1989] 424** and ***Peter Kioko & 3 Others v. Republic*, Cr. App. No. 270 of 2011** were cited in support of the proposition that evidence of identification by a single witness must be subjected to close scrutiny and be admitted with great circumspection. The judgment in ***Charles Ouma v. Republic*, Cr. App. No. 222 of 2002** was also cited to emphasize the importance of description of a suspect at the earliest opportunity.

As regards the failure of the High Court to subject the evidence to exhaustive evaluation, it was submitted that had the court discharged its duty in that regard, it would have readily noted the circumstances under which the appellants were identified were difficult and would not have convicted the appellants. The appellants further submitted that due to its failure to analyze the evidence closely, the first appellate court failed to notice that there was a missing link between the arrest of the 2nd appellant and the robbery and that had it considered that fact, it would not have upheld the conviction.

Mr. Ayodo, ***Senior Principal Prosecuting Counsel*** opposed the appeal contending that the conviction was proper and safe. He submitted that the first appellate court had closely re-evaluated the evidence and in so doing reminded itself of the danger of relying on the evidence of a single identifying witness. It was his further submission that because of close re-evaluation of the evidence, the High Court rejected the evidence of the 1st appellant's recent possession of the property stolen from the complainant.

As regards the identification of the appellants, counsel submitted that the same was sound and reliable because the 2nd appellant first approached the complainant at 3.00 pm and negotiated for the transport. He went away and returned at 6.00 pm and they drove together for a long period of time. Turning to the identification of the 1st appellant it was submitted that he was also with the complainant for a considerable period of time; that in the vehicle he sat next to the complainant giving him directions from Kilifi towards Chumani; that the complainant was able to describe the role of the 1st appellant in threatening him with a pistol; and that on the whole, the complainant spent a reasonably long time with the appellants up to the time they tied him to a tree and abandoned him in a forest, to enable him identify them without difficulty.

We have carefully considered the record of appeal, the judgments of the two courts below, the grounds of appeal, and the submissions by learned counsel. That the trial court is obliged to consider and accept evidence of identification by a single witness with extreme care and caution cannot be gainsaid. Thus for example, in ***Cleophas Otieno Wamunga v. Republic*, Cr. App. No. 20 of 1989** this Court expressed itself thus:

> ***"Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

(See also ***Roria v. Republic* [1967] EA 583; *Joseph Ngumbao Nzoro v. Republic* (1991) 2 KLR 212;** and ***Republic v. Eria Sebwato* (1960) EA 174).**

From its judgment, it is clear to us that the trial court was alive to its duty as regards evidence of identification. The trial magistrate, for example expressed himself as follows:

> ***"He (the complainant) also identified both the 1st accused through an identification parade and in spite of this being identification by a single witness, I am satisfied that PW2 correctly identified both the 1st accused and 2nd accused given the ample time and lighting that was***

available." (Emphasis added).

For its part, the High Court addressed the issue of identification by a single witness directly as follows:

> ***"In this case PW2 was at all material times alone. As such he is the only witness who was able to identify the two appellants. In the case of Maitanyi v Republic [1986] KLR 198 the Court of Appeal in discussing identification by a single witness had the following to say:***
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> ***'Although it is trite that a fact may be proved by the evidence of a single witness, this 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.'***
>
> ***Therefore where identification is being made by a single witness, more so in such a serious offence then great care must be taken to interrogate such evidence and find it to be watertight.***"

We find that the two courts below were acutely aware of their duty to rely on the evidence of a single identifying witness only with due care and circumspection. In addition, there is sufficient evidence on record, which provides sufficient assurance that the convictions were indeed safe. As regards the 2nd appellant he first met the complainant at 3.00 pm during which time they negotiated the fare for transporting his alleged goods from Kilifi to Kengeleni. According to the complainant, they were together for about 30 minutes after which they agreed to depart for their mission at 6.00 pm. This meeting took place in daytime and was not a fleeting encounter. At 6.00 pm the 1st appellant came back and with the complainant they drove to Mtwapa where they stopped to pick another person and to fuel the vehicle. Thereafter they were together for about 1 hour as they drove to Kilifi.

As for the 1st appellant, he joined the vehicle at Kilifi purportedly to show the complainant the alleged goods that he was to transport to Kengeleni. The time was about 7.00 pm and it was the complaint's evidence that he could see the 1st appellant very clearly both from the lights in the vehicles' cabin and the vehicle's lights when they were outside. The complainant and the two appellants took time to negotiate the additional fare from Kilifi to Chumani before settling on an additional Ksh.1,000/-. As they drove towards Chumani, the 1st appellant sat next to the complainant, giving him directions to the place. According to the complainant, they drove for another 1 hour before the appellants requested him to stop so that they could relieve themselves. They were all together out of the vehicle relieving themselves before the 1st appellant confronted the complainant with a pistol. The Motor Vehicle lights were on. Thereafter they drove to the forest where they tied the complainant to a tree after blindfolding him.

In the above circumstances, it is not surprising to us that the complainant did not have any problem picking out the two appellants in two separate identification parades. Further, in the circumstances of this case, we are satisfied that there is no substance in the submission that the identification of the appellants by the complainant was undermined by the latter's failure to describe the appellants to the police.

Having carefully considered this appeal, we are satisfied that the High Court properly and adequately reappraised the evidence on record before coming to the conclusion that the appellants' conviction was well founded. Indeed as submitted by counsel for the respondent, the first appellate court could not have discounted the evidence on the doctrine of recent possession if indeed it had not thoroughly re-evaluated the evidence in its entirety.

We accordingly conclude that this appeal has no merit and is accordingly dismissed. It is so ordered.

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