**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CRIMINAL APPEAL NO.218 OF 2010**

**BETWEEN**

**ALLAN OCHIENG OKEYO & ANOTHER ……..... APPELLANT**

**AND**

**REPUBLIC …….....…….....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated 20th June, 2010*

*in*

*H.C.Cr.A.Nos.143 & 144 of 2007)*

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## JUDGMENT OF THE COURT

Philip Mwendwa Mutisya (PW1), was the complainant in Criminal Case Number 2883 of 2006 lodged in the Chief Magistrate's Court at Mombasa. He had been employed as a messenger with Bawazir Company whose proprietor was Hafidh Said Bawazir (PW2). Part of his duties entailed banking money on behalf of the company. He had been on this job for close to 33 years. On 8th August, 2006 at about 11 am. in the company of PW2 they left for Habib Bank to deposit Kshs.220,000/-. PW1 was walking a few steps ahead of PW2 and had carried the money in a black paper bag. They decided to walk to the bank since the motor vehicle they would have used for the purpose had broken down. As they walked, PW1 was suddenly attacked when someone grabbed him and held him by the neck and knocked him down rendering him comatose. When he came to he realized that Kshs.76,000/- out of Kshs.220,000/- he was carrying could not be accounted for. Apparently it had been taken by his attackers. PW2 saw all that happened. As they trudged along, he suddenly heard PW1 screaming "thief, thief" and saw PW1 on the ground struggling with some people who were trying to forcefully take the paper bag with the money from him. They were armed with a toy pistol and a knife. The screams of PW1 attracted other members of the public among them PW1's colleague, Justus Biria (PW3) as well as P.C. Rotich (PW5) a police driver then attached to the Assistant Commissioner of Police, Provincial Police Headquarters, Mombasa. They all rushed to the scene and managed to subdue the two robbers whom they arrested and detained. However, an accomplice made good his escape. As they struggled for the money, some scattered on the

ground totaling Kshs.144,000/- which PW2 managed to retrieve and later banked. However by the time PW5 arrived on the scene, he found the two robbers already in the custody of PW2, PW3 and other members of the public. The duo were then handed over to him and on conducting a quick search he recovered a toy pistol and knife. Done with the quick search on them, he re-arrested the robber and drove them to Central Police Station and handed them over to Cpl; James Soita (PW4), the investigating officer. PW4 took possession of the exhibits and after further investigations, charged the duo with the capital offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The duo so charged were none other than the appellants herein. Particulars of the charge were that the appellants on 8th of August 2006 along Mvita road in Mombasa District of the Coast Province, jointly with others not before court whilst armed with toy pistols and a knife robbed Philip Mwendwa Mitisya of Kshs.76,000/- and at or immediately before or after such robbery used personal violence to the said Philip Mwendwa Mutisya.

The appellants denied the charge. The 1st appellant in his defence claimed that on the material day, he came to town at about 11.30 a.m. en-route to seeing a patient. While passing Kenya Commercial Bank, Treasury Square branch, he saw a crowd of people shouting "thief thief". One of them then claimed that he was one of the thieves. The crowd descended on him and beat him senseless. He was rescued by a police officer in a police vehicle who took him to the police station where he was interrogated regarding this case. He denied his involvement but after nine days in custody he was taken to court and charged with an offence he knew nothing about.

As for the 2nd appellant he claimed that on the day in question he had gone to Kongowea market to buy fruits to sell since he was a fruit vendor. On the way he met a crowd of people who arrested him saying they suspected he was one of the robbers. He was roughed up but the police saved his life by arriving and taking him to the police station where he was charged with an offence he knew nothing about.

Having carefully considered the evidence placed before him B.M. Olao, Chief Magistrate (as he then was) in a judgment delivered on 31st August, 2007 found the appellants guilty as charged, convicted them and thereafter sentenced them to death. In convicting them, the learned magistrate delivered himself thus:-

> *"Ultimately therefore, having considered the evidence by both sides, I find that the prosecution has proved its case against the accused as required in law. The accused were two and in the company of others and so long as more than one robber is involved, the offence becomes robbery with violence irrespective of whether or not violence is used. The accused's defence that they were not involved has been considered, found to be lacking in merit and dismissed. If anything, they were caught red-handed. Indeed they were lucky that the police arrived in good time to save their lives – at least 2nd accused acknowledges this fact. The prosecution having proved the case against them both beyond any reasonable doubt, I find each of them guilty of the offence of robbery with violence contrary to section 296(2) Penal Code and convict them accordingly under Section 215."*

Being dissatisfied with both their conviction and sentence, the appellants filed a joint appeal to the High Court. The appeal revolved around the question of their identification and the trial court's treatment of the evidence tendered against them. To the the appellants, the conditions obtaining could not have favoured their positive identification. That they were victims of mistaken identity as they were mere passersby. On evidence, they claimed that it was insufficient to find a conviction. The appeal was certainly opposed by the State. In a reserved judgment delivered on 29th June, 2010 Azangalala, J. (as he then was) and Odero, J. dismissed the appeal holding thus:-

> *"As stated earlier this incident occurred at 1.15 p.m. in broad daylight. Conditions were favourable for a clear and positive identification. The two appellants were caught at the scene and in the very act of robbing the complainant. In these circumstances there was no possibility of a mistaken identity."*
>
> *"In their defences the appellants denied that they were part of the group who robbed the*

*complainant. They both claim to have been merely passing by … the learned trial magistrate in our view made excellent analysis of the evidence relating to identification and gave concrete reasons for his dismissal of the appellants' defense. We too are satisfied that there was positive, clear and reliable identification of both appellants as having been the ones who robbed the complainant. We therefore dismiss this ground of appeal. The second ground of appeal raised by the appellants is that the evidence adduced before the lower court was not sufficient to support their conviction. We have ourselves, as is our mandate carefully examined the evidence on record. In our view it passes muster. The ingredients of this offence were set out by the Court of Appeal in the case of* ***Oluoch v Republic*** *(1985) KLR 549 … It is important to note that proof of any one of the ingredients is sufficient to prove the offence of robbery with violence. In this case the men who attacked the complainant were armed with a toy pistol and a knife. PW2 and PW3 both identified these exhibits in court … They fall under the description of 'dangerous' or 'offensive' weapons. The robbery in question was perpetrated by the two appellants and a third accomplice who managed to escape with the loot … Lastly the appellants did use force in order to achieve their objective … The guilt of the two appellants was proved beyond a reasonable doubt …"*

Dissatisfied with the dismissal of their appeal, the appellants have lodged this 2nd and perhaps last appeal in this Court on the grounds that the High Court failed to analyse the evidence afresh as required so as to reach its own conclusion; that the charge-sheet was defective; that the High Court advanced its own theories in dismissing the appeal instead of relying on the evidence tendered; crucial witnesses were not called, sentence imposed was manifestly excessive; evidence of identification failed to link the appellants to the crime; were not taken to court within the statutory period of 24 hours; and finally, their defences were not considered.

Urging the appeal before us on 9th March, 2015, Mr Ngumbau, learned counsel for the 1st appellant submitted that the charge sheet was defective in that though it was stated therein that only Kshs.76,000/- was stolen, yet evidence led showed that actually Kshs.220,000/- was stolen during the incident with Kshs.144,000/- being recovered subsequently. Accordingly the evidence led was at variance with the charge sheet thereby rendering the charge sheet fatally defective. Counsel further submitted that there was evidence that a sum of Kshs.144,000/- as well as Kshs.76,000/- was banked with Habib Bank on the same day going by the bank deposit slips tendered in evidence. If that be the case then there was no loss rendering the offence charged unproved. On identification of the appellants, counsel submitted that the evidence was not properly evaluated by the High Court. The offence may have been committed during the day but it was possible that PW2 and PW3's view could have been impeded by members of the public walking along the street. Further the appellant had explained away his presence at the *locus in quo*. That explanation was plausible but both courts never gave it due consideration. Finally, counsel submitted that the proximity between PW2, PW3 and the appellant and the duration of the attack was not properly interrogated. This led to several gaps in the prosecution case that should have been resolved in favour of the appellant.

For the 2nd appellant, Mr Munyallo, learned counsel urged that the High Court did not reassess the evidence tendered during the trial as required. Had it done so, it would have reached a different conclusion. On identification counsel submitted that neither PW2 nor PW3 really saw what happened. They only heard screams. Counsel further submitted that PW1 was attacked from behind and did not therefore see the attackers. The appellant having allegedly been arrested by members of the public it was absolutely necessary for the member(s) of the Public to testify as to connect the appellant to the offence. In the absence of such evidence, the prosecution evidence was weak and incapable of sustaining a conviction.

The appeal was opposed. Mr Kiprop, learned principal prosecution counsel submitted that there was extensive interrogation by the High Court of the evidence tendered before the trial court. Accordingly it was not correct as submitted by the appellants that the evidence was not subjected to a fresh and exhaustive evaluation. With regard to the charge sheet, counsel submitted that since Kshs.144,000/- was recovered at the scene it could not have formed part of the charge-sheet. In any event **section 137** of the Criminal Procedure Code was clear with regard to framing of charges and if there were any contradictions

the same were curable under **section 382** of the Criminal Procedure Code. Further no prejudice was occasioned to the appellants with regard to the amounts stated in the charge sheet. Regarding identification, counsel submitted that the appellants were arrested at the scene and in broad daylight. There can be no question therefore of mistaken identity. In any event there are concurrent findings by the trial court and High Court on the question of identification which this court is bound to honour. Turning on the failure to call at least a member of the public involved in the arrest of the appellants to testify counsel submitted that **section 143** of the Evidence Act was clear that no particular number of witnesses are required to prove a fact. In this case the 2 prosecution witnesses who witnessed the incident were sufficient.

This is a second appeal. Pursuant to the provisions of section 361(1) of the criminal Procedure Code, only matters of law fall for consideration to be considered by us unless it is shown that irrelevant matters were considered by the Courts below or that relevant matters were not considered in which case we would treat their consideration or lack of consideration as matters of law. From the submissions of respective counsel the determination of this appeal should turn on the question of defective charge sheet, identification of the appellants, re-evaluation or lack of it of the evidence tendered during the trial by the High Court and failure by the prosecution to call some witnesses.

With regard to the alleged defects in the charge sheet, we note that PW1 was carrying with him Kshs.220,000/=. This money was robbed of him. However, in the process some amounting to Kshs.144,000/= spilled on the ground and was recovered by PW2 as the appellants were being arrested by members of the public. Kshs.76,000/= was however not recovered. It is possible that accomplice fled with this amount. Recovery of Kshs.144,000/= was after the act of robbing PW1 had been completed. Ideally, therefore the appellants ought to have been charged with robbing PW1 of the entire sum. Besides, whether the appellants were charged with robbing PW1 Kshs.76,000/= or the whole amount, what difference would it have made? The fact of the matter is that a robbery was committed on PW1. Did the appellants suffer any prejudice in any event? We do not think so. Further s**ection 137** of the Criminal Procedure Code sets out detailed rules for the framing of the charges. The charge sheet should commence with a statement of the offence charged, followed with particulars of the offence. The language used should be ordinary, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence. In this case, we have no doubt at all that the offence charged and the particulars thereof were clearly set out and the appellants were aware of the case confronting them. The differences in the amount involved is a minor misdescription that is easily curable under section 382 of the Criminal Procedure Code.

There was also an argument by the 1st appellant that since there were bank deposit slip showing that a sum of Kshs.220,000/= was banked on that day, then there was no theft, hence the appellant should not have been charged with capital robbery. Yes, there is evidence that a sum of Kshs.144,000/= and Kshs.76,000/= respectively were banked on the same day of the robbery. However, there is evidence that Kshs.144,000/= was recovered at the scene by PW2, who later banked the same after he was done with the police. There is evidence that Kshs.76,000/= was actually never recovered. We cannot therefore comfortably conclude that the amount of Kshs.76,000/= that was later banked were the proceeds of the robbery. Further, there is no evidence that the two bankings were done simultaneously or at the same time. We do not wish to speculate the origin of Kshs.76,000/- that was banked. There could be a perfect legitimate explanation that was not pursued by the prosecution.

On identification of the appellants, we note that there are concurrent findings by the trial court and the first appellate court that the appellants were caught red handed robbing PW1 and that the robbery was committed in broad daylight thereby eliminating the possibility of mistaken identity. These findings were based on proper evidence that was adduced in court by PW2, PW3 and PW5 who were cross-examined at length. In their defences, the appellants never denied their presence at the scene. Indeed, they all admitted their presence. However, the main plank in their defence was that they were victims of mistaken identity. All these was considered by the trial court and the High Court. After careful consideration, the two courts found the defence sloppy and wanting and rightly so in our view. Of all members of public present why was it that all the witnesses settled on the appellants as the perpetrators of the robbery. PW2 had seen the robbers armed with a toy pistol and a knife. When arrested and a quick search conducted on

them by PW5, they were found in possession of these weapons. It could not just have been coincidental. In our view, we have no sufficient reasons to fault those concurrent findings.

We have considered the law on identification, and particularly on visual identification and what is required in law before a court can safely convict an accused person. The law is that a court can convict on the evidence of visual identification but it has to test with greatest care such evidence, particularly when the circumstances under which such identification was done were not favourable. The law is also clear on what aspect of evidence would enable a court to test the evidence of a witness with greatest care. This court in the case of **Kariuki Njiru and 7 Others v Republic, Criminal Appeal No. 6 of 2001 (UR)** stated:-

> *"…The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error…"*

As stated earlier, the robbery was committed in broad daylight. In fact it was at about 1.15p.m. Conditions were favourable for clear and positive identification. PW2 and PW3 were only steps away from the scene of attack. The two appellants were caught at the scene and in the very act of robbing PW1. Because of the short distance between PW1, the robbers, PW2 and PW3, the possibility that the appellants were victims of mistaken identity does not arise, nor can the argument that the view of PW2 and PW3 may have been impeded by the crowd at the scene hold. Just like the trial court as well as the first appellate court, we too are satisfied that there was positive, clear and reliable identification of both appellants as having been the ones who robbed PW1. We would therefore dismiss this ground of appeal as well.

The appellants too have lambasted the High court for failing to re-evaluate and re-analyse the evidence tendered before the trial court so as to reach its own conclusion. We do not think that this complaint is merited. We must say at once that the High Court, acquitted itself very well in this regard. It dedicated almost half of the judgment in looking at the evidence tendered. Indeed the High court was very much alive to that role as it started by citing the case of **Ajode v Republic [2004] 1 KLR 81** for the proposition that as it was sitting as a first appellate court, it was mindful of its duty to re-examine the evidence adduced before the lower court and make its own conclusions without overlooking the conclusions of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and facts to satisfy itself on the correctness of the decision. The High Court in the matter before us, went through the evidence, considered whether or not the charge of capital robbery was sustainable and answered in the affirmative. The court then extensively considered the question of identification and came to the conclusion that the appellants were positively identified at the scene. From the foregoing, it is quite clear that the 1st appellate court was conscious of its duty. We are satisfied that the High Court satisfactorily re-evaluated the evidence as was expected of it. To say otherwise is to unfairly criticize that court.

The last issue raised by the appellants was that to link them to the crime, it was desirable to call as witnesses members of the public who allegedly were involved in their arrest. Mr. Kiprop, in answer, submitted that in his view the evidence against the appellants was sufficient to sustain their conviction and the same could not, properly be said to be barely sufficient. Of course, Mr. Kiprop was re-echoing part of the holding in **Bukenya & Another v Uganda [1972] EA 549** without citing the case. We agree with Mr. Kiprop that the evidence on record against the appellants was simply overwhelming. We earlier set out the evidence of the eye witnesses. In the premises, the evidence of a member of the crowd would simply have been superfluous. And as correctly observed by Mr Kiprop, you do not require a plethora of witnesses to prove a fact. See **section 143** of the Evidence Act.

In the final analysis, there are no grounds for interfering with the concurrent findings of fact by the two lower courts below. We are satisfied that the appeal was properly dismissed by the High Court.

Accordingly, we too dismiss the appeal.

**Dated and delivered at Malindi this 30th day of April, 2015.**

**H. M. OKWENGU**

**……**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**F. SICHALE**

**……**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***