IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 106 OF 2013

ZACHARIA KOKOT LONDOPASH……..…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal from the conviction of the High Court of Kenya at Nyeri

(Wakiaga &Ombwayo, JJ.), dated 21st November, 2013

in

H.C.CR.A. No. 159 of 2009)

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JUDGMENT OF THE COURT

This is a second appeal against the judgment of Wakiaga and Ombwayo, JJ., dated 21st November, 2013, in which the appeal by Zacharia Kokot Londopash, (the appellant), herein was dismissed. The brief essential background information of this matter is as follows. On 24th November, presumably in the year 2007, (the year is not indicated in the evidence of PW1), at about 8 p.m., John Mwangi Kamunya, (PW1), the complainant in this matter while in the company of Paul Nderitu Gichuhi, (PW2), were going home after work. They were travelling in the complainant's motor vehicle KIH 769 Pick Up and the complainant was driving. When they reached Mwiyego River, the vehicle stalled as it ran out of petrol. Both witnesses got out of the vehicle and started refueling from a jerry can which was in the vehicle. As they were doing so, they suddenly saw a group of six people emerge from a nearby bush.

The people asked the complainant whether he could give them a lift to Naromoru, but the complainant said he was not going towards that direction. The complainant said he recognized the appellant whom he knew for many years, they used to live in Naromoru and his face was not covered. The appellant went round the vehicle and ordered the other men to attack. The complainant was knocked down by the men, and ordered to produce money. The complainant told them the money was inside the car and as he was trying to get to the car, he was knocked again. As he struggled with the attackers, he was cut with a panga. He momentarily lost consciousness but when he came to his senses, he found himself in a ditch. He was robbed of his mobile phone, a torch, gumboots which he had worn, a panga and jembe that were in the vehicle.

The complainant told the trial court that after the attack, he drove the vehicle to a friends' home and also to Narumoro police station where he reported the matter. As he was injured badly, he was issued with a P3 form and went to hospital where he was admitted for a week. He also recorded his statement with the police indicating that he knew Zacharia as one of his attackers. PW2 told the trial magistrate that he too was ordered to produce money, the attackers robbed him of Kshs.200/= and a phone. PW2 also stated that he recognized the appellant whom he knew for about a year as he was employed within the area of Naromoru to herd cattle. He said although it was at night, there was moonlight and also the front headlights of the motor vehicle remained on during the attack.

The other evidence that was relied on by the trial court was by Police Corporal Robert Mukuno, PW3, he was the Investigating Officer in this case. He told the trial court that on the 30th November, 2007, he received a report from a member of the public that a certain person was attacked by robbers and was taken to hospital. The following day, he traced the caller who took him to the complainant and he recorded the statement and was given the name of the attacker as LondaPoshi. This witness said he later learnt the appellant was arrested by Nanyuki Police but this is the witness who charged him with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***.

The particulars of the charge stated that on the 24th day of November, 2007, at Male area Matanyaini Laikipia District within the then Rift Valley Province, jointly with other not before court robbed John Mwangi Kamunyu of one cell phone make Nokia, a jacket, pair of gumboots and a panga all valued at Ksh. 5000/= and at or immediately before or immediately after the time of such robbery wounded the said John Mwaniki Kamunya.

The appellant pleaded not guilty to the charge, the learned magistrate having heard the evidence of the three prosecution witnesses found the appellant had a case to answer and put him on his defence. The appellant gave unsworn statement of defence denying the offence. He gave a chronology of the events that occurred on the 27th November, 2007, the day he was arrested by the police. He contended he used to work at Narumoru and on the material day at about 8 p.m., he was on his way to his home after work. He met with a taxi vehicle which stopped and four police officers came out and demanded to know where the appellant was going. He told them he was going home. They, nonetheless, handcuffed him and took him to the police station and later on charged him with the instant charge which he knew nothing about.

The leaned trial magistrate was satisfied that the offence against the appellant was proved to the required standard; she convicted and sentenced him to death. Being dissatisfied with the conviction and sentence, the appellant unsuccessfully appealed to the High Court. Unrelenting, the appellant filed this second appeal which is premised on some three grounds of appeal as per the supplementary grounds as follows:-

1. ***The learned Judges of the High Court erred in law and fact for failing to analyse the evidence on record as the law requires and come up with its own conclusion. A failure of justice was, therefore, occasioned.***

2. ***The learned Judges of the high court erred in law and fact for failing to find that the offence of robbery with violence was not proven to the required standards.***

3. ***The learned Judges of the high court erred in law for completely disregarding the appellant's defence and merely agreeing with the finding of the subordinate court. A miscarriage of justice was, therefore, occasioned.***

In further elaboration of the above grounds, Mr. Ng'ang'a, learned counsel for the appellant, submitted that the High Court judges failed to carry out the mandatory requirement of subjecting the entire evidence to fresh scrutiny; had they done so, they would have resolved many gaps and inconsistencies in evidence in favour of the appellant. For example, the charge sheet indicates that the appellant was arrested on 28th December, 2007, and he was taken to court on the 6th December, 2007. Obviously, this was an error as the appellant could not have been taken to court before he was arrested. Secondly, there was no evidence on how the appellant was arrested, when or by whom. The defence by the appellant was also not

considered, the appellant stated that he was arrested on his way by police officers who were never called as witnesses. The investigating officer learnt about the arrest of the appellant from other people whom he did not name. According to counsel, the defence by the appellant was merely dismissed by both courts below thereby denying him a fair trial.

Counsel further submitted that the offence of robbery with violence was not proved as the injuries allegedly sustained by the complainant were not proved. There were so many inconsistencies in the evidence regarding the injuries suffered by the complainant; the complainant stated that after the injuries he reported the matter at Narumoru Police Station where he was issued with a P3 form. This P3 form was never produced in evidence, and the Medical Officer who treated him was not called. As if that was not enough, PW3 stated that he learned about the instant robbery from another source on the 30th November, 2007, he visited the complainant who gave him the name of the suspect. Thus, had the two courts below considered this evidence, it would have become clear to them that the name of the appellant as the suspected attacker was not given to the police immediately after the robbery. Counsel urged us to allow the appeal.

On the part of the state, Mr. Kaigai, learned Assistant Director of Public Prosecutions, opposed this appeal. Counsel submitted that the case was adequately proved against the appellant based on evidence of identification through recognition. The scene of the robbery was well lit by moonlight and also the motor vehicle lights that remained on during the attack aided the two witnesses in with identification. The appellant had not covered his face. Regarding the inconsistences that are on the charge sheet, counsel for the state submitted that they were curable under the provisions of ***Section 382*** of the ***Criminal Procedure Code***.

This is a second appeal. By dint of the provisions of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See ***Karingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In ***David Njoroge Macharia –v- R, [2011] eKLR,*** it was stated that under ***Section 361*** of the ***Criminal Procedure Code*****:**

"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong -vs- Republic, (1984) KLR 213)".

We discern two issues of law that we think warrant our consideration; firstly, whether the learned Judges of the High Court failed to subject the evidence to fresh analysis and secondly, whether the offence against the appellant was proved to the required standard. The conviction of the appellant was principally hinged on the evidence of identification through recognition of the appellant by PW1 and PW2 as one of the six persons who violently robbed them.

We agree with counsel for the appellant that the investigations in this matter were done slovenly there is a lot to be desired regarding the first report, the complainant stated that he made the report at Narumoru Police Station and he named the appellant as one of the attackers. PW3, who the Investigating Officer said he was from Matanya police, and he learnt about the robbery from another person, after which he traced the complainant. This is what this witness told the trial court in his own words:

" I am the Investigating Officer in this case. I recall 30th November, 2007. I was at Matanya Police Base and I received call from a member of the public at Mare area. He informed me that a certain person had been attacked by robbers (sic) taken to hospital. He had left hospital (sic) land was at home.

The following day in the month of December, I went up to Mare and traced the caller. He took me to

the vehicle's home where I found the complainant. The complainant told me that he had been travelling through a motor vehicle and was confronted by robbers about six of them. The robbers attacked the complainants; his colleague beat them and injured them. He further told me that he had already reported matter (sic) Narumoro Police Station and given the name of one of the suspect prior to going to hospital.

I recorded his statement and the complainant gave me the name of the suspect one Lond poshi, the accused before court. I recorded his statement and liaised with Narumoro Police Station, whereby, I learnt the person had already been arrested by Nanyuki police station. I issued the complainant with P3 Form MFI (1), and later, the OCS Narumoro Police Station told me to plan how accused would be taken to court. I prepared his file and took him (sic) Nanyuki police station where he was charged before court".

The appellant denied the offence and contended that he was arrested on the 27th November, 2007, when he was going about his business. Indeed, counsel for the appellant has faulted the two courts below for failing to take into account the defence by the appellant which in his view remained unchallenged as there was no evidence on how, when or by who arrested him. That means his defence evidence was not at all challenged, but the two courts below failed to analyze it at all. In ***Njoroge –vs- R, (1987) KLR 19,*** this Court stated;-

"It is the duty of the first appellate court to remember that the parties are entitled, as well on the questions of fact as on the questions of law, to demand a decision of the court and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and it should make due allowance in that respect".

If the first appellate court fails to carry out that duty, it becomes a matter of law on second appeal whether there was evidence to support the conviction. In the instant case, a further issue was raised on whether the offence of robbery with violence was proved granted that the description of the other persons who were with the appellant when they committed the offence was not given, and the evidence of the injuries sustained by the complainant were not verifiable as the P3 form was not produced in evidence and the Medical Officer who treated the complainant for the injuries he sustained was not called as a witness.

We are acutely aware of the provisions of ***Section 143*** of the ***Evidence Act***; there is no requirement for a particular number of witnesses unless specifically spelt out by statute. A further caution to bring to bear is, if the arresting officer and the medical officer who treated the complaint respectively were called to give evidence, would their evidence have been adverse to that by the prosecution. See the case of ***Bukenya v Republic, [1972] E.A. 549*** where it was held that:

"The Court can only draw an adverse inference that had the witnesses been called their evidence would have been adverse to the prosecution case".

While the answer to the above remains unclear to us, and continues to linger in our minds, we are confronted by the evidence of identification through recognition by both PW1 and PW2. The two witnesses said they recognized the appellant as they used to see him within Narumoru area. It was PW2 who described the mode of lighting that enabled him to identify the appellant. PW1 did not say how he was able to identify the appellant. In ***Anjononi & Others -vs- Republic, (1976-80) 1 KLR 1566,*** this Court held at page 1568:

"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another".

Time without number this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the case of ***R –vs- Turnbull and Others, (1976) 3 All ER 549***, Lord Widgery C.J. had this to say:-

"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judges should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judges should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

Although PW2 said he was able to recognize the appellant under the prevailing circumstances which were difficult, there was need for the two courts below to subject this evidence to further testing and possibly collaboration with other evidence. The appellant was not arrested with any stolen property, he was arrested later under unclear circumstances as aforementioned. There was no evidence of a first report, as the matters stand, although PW1's evidence was that he reported the matter at Narumoru Police Station where he was issued a P3 form, nothing turns on that report. As can be seen from the evidence by PW3 which is reproduced here above, he heard about the robbery through another person. This was after a week, when he visited the complainant, recorded a statement and issued him with a P3 Form.

What compounds the matter further is the fact that the appellant was not arrested by police officers from Narumoru Police Station where the complaint was reported, he was also not arrested by PW3, who was from Matanya Police Post. He was arrested by Nanyuki police. What the two courts below looked at was merely the prevailing circumstances when the offence occurred and found there was moonlight and according to PW2 he said he was aided by the motor vehicle lights to identify the appellant. In the circumstances of this matter, it was necessary to look for other corroborative evidence to confirm that the identification of the appellant although done at night was safe to sustain the conviction. This could have been in form of a first report giving the description of the appellant. However, in this case there was no first report backed by the description given by the witnesses, and if there was, it was not adduced in evidence. It still remains a mystery how the appellant was arrested and who gave out his description to Nanyuki Police who arrested him. We believe this is the kind of evidence that counsel for the appellant submitted left a gap in evidence which lends credence to his submission that had the defence by the appellant been analyzed by the two courts below, there are doubts as to whether the appellant was arrested when he was merely going about his business as posited in his defence or he was actually the perpetrator of the robbery against the complainant.

For the aforementioned reasons, we find the High Court Judges failed in their duty of re-evaluating the defence evidence and the evidence of identification especially how the evidence of identification of the appellant led to his arrest. We find there was no connection between the report and the arrest of the appellant. Failure to connect how the description of the appellant led to his arrest leaves room for speculation which entitled the appellant to benefit from the doubts created.

Accordingly we find merit in this appeal which we allow. The conviction of the appellant is quashed; the death sentence is set aside. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

Dated and delivered at Nyeri this 13th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR