



**IN THE COURT OF APPEAL**

**AT MALINDI**

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

**CRIMINAL APPEAL NO. 9 OF 2013**

**BETWEEN**

**JAMES WAFULA ALIAS ANDREW.....1<sup>ST</sup> APPELLANT**

**COSMAS AKEYA DON ALIAS MOGAKA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the judgment and orders of the High Court of Kenya at Mombasa (Odero & Nzioka, JJ.) dated 19<sup>th</sup> March, 2013***

***in***

***H.C.Cr.A.No.81 of 2009)***

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**JUDGMENT OF THE COURT**

During the months of April, May and June 2007 a spate of violent robberies rocked Kwale District within the then Coast Province. Following police intervention, the appellants together with six others were eventually arrested on suspicion of being the masterminds. They were then arraigned before the Senior Resident Magistrate's Court at Kwale on five counts of Robbery with Violence contrary to **section 296(2)** of the Penal Code. They were also charged in counts 6, 7, 8 and 9 respectively with theft of a firearm contrary to **section 275** of the Penal Code, theft of ammunition contrary to **section 275** of the Penal Code, being in possession of a firearm without a firearm certificate contrary to **section 4** as read with **section 3(a)** of the Firearms Act, being in possession of ammunition without firearm certificate contrary to **section 4** as read with sub **section 3(a)** of the Firearms Act, and lastly, the 1<sup>st</sup> appellant was singularly charged with being unlawfully present in Kenya contrary to **section 13(2)** of the Immigration Act. They all denied the charges and soon thereafter their trial ensued.

In respect of count 1, **Olson Mutua Githome (PW1)**, who was the complainant was in his kiosk at Neptune Beach on 25<sup>th</sup> April 2007 at around 7p.m. when the two appellants walked in with one accomplice in tow. Whilst the 1<sup>st</sup> appellant was armed with a pistol, the 2<sup>nd</sup> appellant was armed with a

*panga*. The 1<sup>st</sup> appellant pointed the gun at PW1 and ordered him to give them money or be killed. He held him by the collar and hit him severally on the face while ordering him to sit down. In the meantime the 2<sup>nd</sup> appellant besides having a *panga* also had a blue bag in which he put all the money that was in the kiosk drawers and other valuables. As the appellants retreated, the 1<sup>st</sup> appellant fired a shot in the air to scare members of public who were in pursuit of them and managed to make good their escape. The complainant later recorded his statement at Diani Police Station and thereafter participated in a police identification parade mounted by **I.P. Gilbert Muturi (PW7)** and **I.P. Gilbert Gitonga (PW16)** in which he managed to identify the appellants. He was able to identify the 1<sup>st</sup> appellant through a scar on his right forehead and the 2<sup>nd</sup> appellant through a scar on his right cheek. During the robbery the 2<sup>nd</sup> appellant had a bandage over the scar. He was assisted in the identification courtesy of the bright light emitted from a generator during the robbery. When the police came to the scene, he was able to give them a description of those who had robbed him.

In respect of counts 2 and 3, **Binti Ali Salama (PW2)** and **Fatuma Sikuku Salome (PW3)** were the complainants. PW2 was at work as a receptionist on 28<sup>th</sup> April 2007 at about 7p.m. at her sister's (PW3) restaurant known as **Fatuma Dishes** when two men walked in, one tall and the other short, and ordered for tea. The tall man approached her and produced a pistol and ordered her to lie down and hand over her handbag, mobile phone, golden chain, earrings and rings. She complied. The robber then ordered PW3, to open the safe and he took the money therefrom as well as that in her bag. The robbers threatened to kill them if they rose from where they had laid down and then disappeared into the night. They subsequently recorded their statements the next day at the Diani Police Station. PW2 had been able to identify the 1<sup>st</sup> appellant as there was sufficient electricity light. He was wearing long trousers and a t-shirt. Later she participated in an identification parade at the Diani Police Station where she picked the 1<sup>st</sup> appellant from the parade.

As for PW3 whilst at **Fatuma Dishes** on 28<sup>th</sup> April 2007 at around 7p.m. two men appeared and greeted her in Islamic lingual, sat down and ordered for drinks. As she came back into the restaurant from serving other customers outside she met a man carrying her sister's bag who ordered her to lie down. She had the keys to the safe and was ordered by the same man to open it and they took all the money that was inside. She was also ordered to give away her jewellery. When they finished, the robbers managed to escape unscathed. Subsequently she participated in the identification parade at the police station and was able to positively identify the 2<sup>nd</sup> appellant after asking him to repeat the order 'lala' as that was the order directed at her during the robbery. She was also able to identify him as by virtue of his short stature. She identified the 1<sup>st</sup> appellant by a mark he had on his forehead and his tall height. During the robbery, she confirmed that there was enough light at the restaurant. She was even able to see and describe the clothes that the appellants were wearing.

On count 4, **Charity Karimi Naiboro (PW4)**, the victim, worked at Titanium Bar as a bar tender and was at work on 6<sup>th</sup> May 2007 when at around 11p.m. the 1<sup>st</sup> appellant entered the bar, greeted her and then immediately left. Her fellow bar tender, **Mwanasha Suleiman Chizuga (PW11)** was suspicious of the man and went outside to ask the bar's watchman who the strange man was. Shortly thereafter, she heard her fellow bartender come back screaming that they were thieves and she closed the door and also started screaming. The 1<sup>st</sup> appellant then came to the window and ordered her to open the door. Upon opening, the 1<sup>st</sup> appellant walked in armed with a pistol while the 2<sup>nd</sup> appellant was unarmed. The 1<sup>st</sup> appellant then took the watchman's *rungu* and violently hit her on the head while demanding money from her. In the meantime, the 2<sup>nd</sup> appellant opened the cash box and took out the money. They also took with them radio cassette make Sony as well as her pouch. She was later to identify the appellants at a police identification parade. She identified the 1<sup>st</sup> appellant from his appearance and the 2<sup>nd</sup> appellant from a scar on the left side of his mouth as she had a good look at them during the robbery. She was assisted in doing so by the bright electricity light at the scene. She was even able to describe the 1<sup>st</sup> appellant's clothing.

**Abdallah Hamisi Mwaranu (PW12)** is the proprietor of Golden Meat Butchery. On 23 May 2007 at

around 7:30p.m or thereabouts, he was seated outside his business aforesaid, when he heard his butchery attendants, **Shee Yusuf** and **Murijo**, the complainant in count 5 scream “*THIEVES, THIEVES!*” As he was seated just a few meters away he could see inside the butchery and the appellants well from the electricity light. He threw a stone inside the butchery and thereafter heard a gunshot. He decided to escape and as he ran he heard another gunshot and lay down. Nonetheless, from that position he was able to see the 2<sup>nd</sup> appellant take the money while the 1<sup>st</sup> appellant stood at the door and fired the shots. After about 5 minutes, the butchery attendants came for him and they went back to the butchery. Police officers from Diani Police Station arrived and collected the spent cartridges. He was later able to pick out the appellants at the Diani Police Station at an identification parade.

Count 6 concerned the theft of a pistol make Ceska from **C.I. Edward Chigachi**, whereas counts 7, 8 and 9 were all related to the said firearm as already detailed elsewhere in this judgment. In support of these counts, **PC Daniel Matheka (PW8)**, **PC Kennedy Muriithi (PW9)**, **CPL Issa Said Wachita (PW10)** and **C.I. Peter Kiema (PW14)** all testified with regard to the recovery of the stolen firearm as well as the spent cartridges. Suffice to add that with regard to the theft of the firearm, **C.I. Edward Chigachi (PW13)** was the officer in charge of Tourist Police Unit in Kwale. On 25<sup>th</sup> April 2007 he was on duty when he left his office to go for a short call and when he came back found his pistol make Ceska together with 15 rounds of ammunition missing. He reported the matter to the relevant superiors. On 8<sup>th</sup> June 2007 he was called and told that his pistol had been recovered following a robbery at Diani and one of the suspects was a Police Constable Ndegwa. He later confirmed the recovered pistol to be his.

**C.I. Lawrence Ndiwa (PW15)** a Firearms Examiner examined the firearm and cartridges recovered at the various scenes of crime and formed the opinion that the spent cartridges were fired from the same firearm being the Ceska pistol stolen from PW13. That pistol had been recovered allegedly from the 1<sup>st</sup> appellant upon arrest by **PC Benard Gikandi (PW18)** following a tip –off.

Count 10, the final charge, was only against the 1<sup>st</sup> appellant and alleged that he was a Ugandan Citizen who at the time of his arrest in Ukunda Diani had no pass or permit authorizing him to be in Kenya. Evidence on this was his own admission.

Put on their defence, the appellants denied involvement in the crimes and advanced witch-hunt as a defence. Despite these defences, the appellants were convicted on counts 1, 2, 3 and 4 and sentenced to death. In addition the 1<sup>st</sup> appellant was convicted on counts 8, 9 and 10 and sentenced to 15, 15 and 2 years imprisonment respectively. The terms were ordered to run concurrently. The rest of their co-accused were all acquitted of the offences.

Dissatisfied with the conviction and sentence, the appellants lodged an appeal to the High Court. The appeal was heard and determined by **Odero** and **Nzioka, JJ.** ending in its dismissal. That dismissal provoked this second and perhaps last appeal.

The appellants raised similar grounds of appeal that both courts erred in:

- merging counts 1,2,3,4 and 5 in the charge sheet.
- failing to properly re-evaluate the evidence of identification.
- in not appreciating that the identification parades mounted were of little value since the description of the appellants by identifying witnesses had not been given prior.
- in failing to appreciate that the prosecution case was poorly investigated.
- in not appreciating that the prosecution had failed to prove beyond reasonable doubt the serial number of the alleged recovered firearm.
- in failing to consider their defences adequately before rejecting them.

At the plenary hearing of the appeal, **Mr. Ngumbao** learned counsel for the appellants urged the appeal on two grounds only. First, identification of the appellants and secondly, failure by the High Court to re-evaluate evidence so as to reach its own conclusions. Counsel submitted that evidence in respect of count

one was of a single identifying witness as the complainant had claimed to have identified the assailants through generator light since the attack happened at night. According to counsel, such identification was insufficient and unreliable since it was the only evidence against the appellants in count one. He cited the case of **Wamunga v Republic [1989] KLR 424** for the proposition that such evidence must be examined carefully. In the instant case, counsel submitted that there was no meticulous and careful examination of the evidence by the trial court and the first appellate court.

Counsel argued that the intensity of the light emitted, the size of the generator and the location of the light in relation to the appellants was not subjected to any interrogation as required. Counsel submitted further that it was compulsory for the court to closely examine the circumstances under which the identification came to be made. Counsel contended that the judgment of the High Court only paid fleeting attention to the question of identification. Further, that though the complainant claimed to have given the description of the attackers to the police immediately they arrived, the evidence of PW14, told a different story. PW14 had testified that the complainant was not able to describe the robbers to him as he hid after the shots were fired. On count two, the complainant stated that it was the generator light that had enabled her to see and identify the attackers. Counsel cited the case of **Maitanyi v Republic [1986] KLR 198** where it was held that when relying on the evidence of a single identifying witness, a careful inquiry of the circumstances of identification is required. Counsel further submitted that although the complainant in count two had given description of the attackers to the police, the identification parade forms showed that she was unable to identify the appellant. Further, there was no evidence on record demonstrating that the trial court examined the identification evidence to satisfy itself that the circumstances were free of any possibility of error.

According to counsel, the complainant in count 3 stated that the attackers chose to sit under a shade that had no lights and were therefore engulfed in darkness. She however later stated that there was bright light. Counsel submitted that it was not enough to state first that there was darkness and later change to say there was enough light. Counsel pointed out that the record showed that the complainant claimed to have identified the second appellant through the bright light and voice, however there was no evidence that the witness was familiar with the appellant's voice. On count 4, counsel contended that the complainant's evidence of identification together with that of PW11, was not subjected to an inquiry of careful testing. It was not shown that it was free from the possibility of error. Counsel stated that the scene of attack was in a bar at around 11p.m, therefore the lighting conditions ought to have been thoroughly interrogated. According to counsel, the prosecution should not have left such issues to speculation.

On the second ground of appeal, regarding the firearms related offences, counsel submitted that the evidence of PW8, Police constable Daniel Matheka, showed that he had recovered only one spent cartridge. PW2 on the other hand testified that he had recovered 2 spent cartridges. Further that PW 14 in his testimony referred to only one spent cartridge. PW15 on his part claimed that he had examined 4 spent cartridges. According to counsel the totality of this evidence was that it was unreliable. Yet the High Court had failed to re-evaluate this evidence as required. Furthermore, that there was no distinction of all the spent cartridges as they were never assigned to any scene of crime.

In respect of count 10, counsel stated that there was no evidence that the 1<sup>st</sup> appellant was a Ugandan citizen neither was any evidence led to show that he was illegally in Kenya. Counsel contended that although the burden of proof was always on the prosecution, the High Court Judges had shifted that burden to the 1<sup>st</sup> appellant.

Learned Assistant Director of Public Prosecutions, **Mr. Monda** in opposing the appeal submitted that the evidence on record clearly placed the appellants at the scenes of crime. Further, the High Court Judges re-evaluated the evidence and came to the right conclusion. In regard to the spent cartridges, Mr. Monda stated that the evidence on record showed that only 4 spent cartridges were recovered and that the evidence was subjected to careful analysis. Counsel stated that evidence of PW15 established that the spent cartridges matched the firearm recovered from the 1<sup>st</sup> appellant. Counsel explained that there were other cartridges recovered from the firearm and were irrelevant to the case.

On identification, counsel submitted that the record showed the circumstances of the identification of the

appellants were favourable. Besides the complainants had given description of the appellants. Counsel submitted that an identification parade was also conducted where the appellants were picked out. According to counsel, the two courts below in essence believed the evidence of PW1 and reminded this court that the trial court had the advantage of seeing the demeanor of the witness. He submitted that there were concurrent findings of two courts below which ought to be respected.

In respect of count 2, counsel urged court to find that although the High Court found that PW2 identified the appellants, the identification forms did not confirm that assertion. That PW2 was not alone during the robbery as there was PW3 whose evidence placed the appellants at the scene and that the evidence was analysed by the High Court which established that the prevailing conditions at the scene were positive for identification, that since PW3 had the opportunity to see and describe the appellants, the prevailing conditions must have been favourable. Counsel went on to submit that the court evaluated the evidence of identification when it stated that PW2 and PW3 had greeted the appellants in the Islamic way when they came into the restaurant showing that they had a face to face encounter.

On count 4 Mr. Monda reiterated that the conditions obtaining were favourable for a positive identification as PW11 was able to give a description of the appellants' clothes on the material day meaning there was close encounter and the incidents took considerable period of time, hence the identification was not flawed in any way and the judges properly evaluated the evidence.

Counsel further submitted that the 1<sup>st</sup> appellant was found in possession of a firearm and had an obligation to explain how he had come by it and whether it was licensed. Therefore, the evidential burden of proof shifted to him and the High Court judges cannot therefore be said to have wrongly shifted the burden.

In a nutshell there was evidence on record according to counsel showing that the appellants were engaged in a series of robberies and were identified during all these robberies. Asked by Court why the prosecution found it necessary to lump in one charge sheet the ten counts when the incidents complained of did not arise in the same transaction, counsel maintained that the appellants had not raised any complaint regarding that act though they were represented by counsel.

*This being a second appeal, this Court is under a legal duty to pay proper homage to the concurrent findings of facts by the two courts below and will only be entitled to interfere if and only if, it is satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it. (see **Boniface Kamande & 2 Others v Republic [2010] eKLR**). Again, this Court's jurisdictional remit on second appeal by statute is limited to a consideration of matters of law only. (See **section 361 (1)** of the Criminal Procedure Code). We have no doubt at all that issues of identification and re-evaluation of evidence are matters of law over which this Court has jurisdiction.*

*From the facts of this case, it's clear that the offences that the appellants were charged with did not arise from a single or same transaction. The appellants were charged with offences that were committed on diverse dates in the months of April through to June 2007. Accordingly, it was not desirable to lump all those incidents in one charge sheet. A joinder of charges is encouraged where several offences are committed in the same transaction. It does not appear that this was the case here. What then we have to ask ourselves is whether the appellants were thereby prejudiced in their defences. We do not think so, considering the robust defences mounted by the appellants and the intense cross-examination the witnesses were subjected to. We also note that the issue was never raised in the trial court despite the presence of counsel. The issue was only raised in the High Court. This is how the High Court resolved it:*

***“.....The appellants did not suffer any prejudice as a result of the consolidation of charges. They were present in court during the testimony of each of the 17 prosecution witnesses and each appellant granted an opportunity and did in fact cross-examine each prosecution witness at length. We find that there was no denial of the trial rights guaranteed by the Constitution of Kenya.”***

*We are of the same view and have no reasons to fault this reasoning.*

*The incidents happened at different places and times and it was therefore necessary that the circumstances and conditions of identification be examined according to each transaction so as to determine whether the appellants were positively identified. In this respect, the two courts below properly directed themselves. They did a thorough job isolating the incidents and dealing with them separately taking into account the circumstances and conditions under which the appellants came to be identified. We do not agree with the submissions by counsel that the evidence of identification was not subjected to careful testing as required by this Court in both **Wamunga** and **Maitanyi** (supra) cases.*

*In count 1 much as the evidence of identification was that of a single witness, there is no bar to acting on such evidence to found a conviction provided the necessary safeguards are put in place. Such safeguards of course include the need for the court to caution itself of the dangers inherent on relying on such evidence, close examination of such evidence as well as the need to look for other independent evidence linking the appellant to the crime. (see **Abdalla Bin Wendo & Another v Republic [1953] 20 E.A.C.A.**) The trial and the first appellate court did not err on this. They minutely and carefully looked at the evidence, incident by incident. With regard to count 1, both courts appreciated PW1's testimony in this manner, that in examination in chief, PW1 stated that though it was at night, there was enough light from a generator to be able to positively identify his two assailants. That light was such that it enabled him to notice the scars on their faces which he described and which were still visible in court during the trial. It is the same scars that helped him pick them from an identification parade two weeks after the robbery. He maintained this testimony and reiterated it in his cross examination by the appellants.*

*Further the two courts appreciated that he was able to see the two assailants clearly as they were inside the shop as they ordered him to give them cash and the other valuables. They were therefore in close proximity. This in our view was careful examination of evidence. Further, both courts found the evidence credible and reliable. These were concurrent findings and we have not been able to detect any flaw that will provide us with the reason to impugn them. Again, the trial court in its determination found PW1's evidence to be "consistent and straight" as to the persons who had robbed him. This perception of the witness by the trial court ought and should be respected. After all it is an observation of the demeanour of a witness by the trial court, which benefit does not accrue to us.*

*On counts two and three, counsel for the appellants took issue with the fact that although the complainant (PW2) had given the description of the attackers to the police, the identification forms on record showed that she was unable to identify the 2<sup>nd</sup> appellant. Mr. Monda for the respondent after conceding this misdirection, however pointed out that though she was unable to identify the 2<sup>nd</sup> appellant she was not alone. When the robbery was committed she was in the company of her sister, PW3. PW3 gave evidence that when she went for the second identification parade, she identified the 2<sup>nd</sup> appellant as the second robber. We agree with Mr. Monda's position. Even if PW2's evidence was to be discounted on this basis, there was still the evidence of PW3 that placed the appellants right at the scene of crime.*

*PW3 was emphatic that the restaurant was lit by bright electric light. Furthermore, she was able to describe the 2<sup>nd</sup> appellant's attire in her testimony and she remembered that it was him who carried a panga during the robbery. Both lower courts analysed this evidence and came to the conclusion that it was reliable. These are concurrent findings of the two courts below which this court has a duty to pay homage to.*

*On count 4 and 5 again the appellants complained that the evidence of identification was not subjected to an inquiry of careful testing given that the crimes were committed late in the night. Again this cannot be true. Both courts looked at the evidence critically and at times produced verbatim extracts of such evidence. No doubt these witnesses had ample opportunity to look at the robbers given their accurate description of what took place and the role played by each of the appellants during the robbery, the conditions for positive identification must have therefore been favourable. Indeed, they maintained that there were bright lights at the scenes of crime. This was followed by their positive identification of the appellants in a police identification parade.*

All said and done, we have no doubt at all that during these robberies, the appellants were not disguised at all, they were always in close proximity with their victims, and they took sometime with the victims in the execution of the offences. The victims were able to identify them by their distinctive features such as scars, their stature and mode of dressing. They even described them to the police. These therefore lends credence to the position of the prosecution that the possibility of the appellants having been victims of mistaken identity non-existent. The two courts below took all these factors into account in reaching their verdicts. Besides, there was the evidence of the police identification parades. None of the appellants claimed that the parades were not carried out as required by the force standing orders. The totality of all these is that the appellant's conviction on the basis of identification cannot be faulted. Accordingly, their argument that such evidence was not subjected to close scrutiny before their convictions were arrived at is unsustainable.

As regards theft of the firearm, the evidence was simply overwhelming. The firearm was found in possession of the 1<sup>st</sup> appellant. He did not offer any explanation as to how he came by it. The natural consequence of that failure attracts the inference that he was the thief. Small wonder that his counsel did not at all submit on this count before us.

In submitting on the ground that the learned judges of the superior court failed to re-evaluate the evidence so as to reach their own conclusions, counsel for the appellants restricted himself to the contradictions regarding the number of the spent cartridges recovered. Witnesses gave different numbers of the recovered cartridges at the crime scenes. However, the evidence of PW10 **Issa Said Wachifa** and **PW5** which courts below accepted suffices to answer the complaint. He was the investigating officer. He confirmed that only 4 spent cartridges were recovered in the entire investigation. Further, **PW15**, the firearms and ammunitions examiner established that the recovered cartridges aforesaid matched the firearm recovered from the 1<sup>st</sup> appellant. Although there were other cartridges recovered from the gun, only the four (4) spent ones recovered at the crime scenes tied the gun found with the 1<sup>st</sup> appellant to the crimes. The two courts considered this evidence and came to the conclusion that it was reliable. Minor contradictions cannot be the basis of accusing a court for lack of re-evaluation of evidence.

Then there is the aspect of the 1<sup>st</sup> appellant being Ugandan and present in Kenya unlawfully. Though he was convicted on this count, we do not see the basis for that conviction. The trial court proceeded on the basis that in his defence he had admitted to being Ugandan. To our mind that is not sufficient evidence to find a conviction for that offence. Being Ugandan in Kenya perse does not necessarily mean that one has committed the offence of being present in Kenya unlawfully. The High Court also fell in to the same error. Had the High Court carefully evaluated the evidence as correctly submitted by Mr. Ngumbao, it would have come to the inescapable conclusion that there was no evidence in support of this count and allowed the appeal in respect of this count. In the premises we allow the appeal on this count, quash the conviction and set aside the sentence on this count alone.

Save for this limited success in count 10, this appeal is otherwise dismissed. We note though that whilst dismissing the appeal, the High Court upheld the death sentence imposed on the appellants in respect of counts 1, 2, 3 and 4. It however directed that the sentence imposed upon the 1<sup>st</sup> appellant in counts 8, 9 and 10 be held in abeyance. In our view the Judges should have similarly directed that the death sentence in respect of counts 2, 3 and 4 be held in abeyance, pending the execution of the sentence in count 1. The simple reason being that if the sentence in count 1, is carried out on the appellants they will not be available to face the sentence in counts 2, 3 and 4. In the premises, we direct that the execution of the sentence in counts 2, 3 and 4 be held in abeyance pending the execution of the sentence in count 1.

**Dated and delivered at Malindi this 29<sup>th</sup> day of May, 2015.**

**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**