IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO.79 OF 2014

BETWEEN

EDWIN CHAGALI MUSIEGA ……..…… APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

Being an appeal from the High Court of Kenya at Mombasa (Odero & Muya, JJ.) dated 21st December, 2012

in

H.C.Cr.A.No.254 of 2008)

****

JUDGMENT OF THE COURT

In convicting the appellant for the offence of robbery with violence contrary to section 296(2) of the Penal Code the learned trial magistrate found that although the offence was committed at night the appellant was positively identified as a member of the gang that robbed the two complainants, Samuel Kagwi Ngure & Peter Kimani Wanjugu on the 4th December, 2007.

The appellants' first appealed to the High Court was dismissed by the learned Judges (Odero & Muya, JJ.) holding that the identification of the appellant and his confederates was with the aid of electricity light from a nearby B.P. Shell Petrol station;

that each of the complainants consistently related the events of the night and described the roles played by each of the attackers with precision; that the robbery took several minutes with the robbers being in close proximity to their victims; that the appellant did not disguise his face; that there was no obstruction between the robbers and the complainants; and that the identification was finally confirmed by the complainants picking out the appellant from the identification parade. The learned Judges having made these observations then concluded that the ingredients of the offence of robbery with violence were satisfied thereby upholding the trial court's decision.

The appellant now brings this second appeal challenging the decision of the High Court on five grounds combining the grounds filed by himself in person and those filed earlier by his counsel. The grounds were clustered into three and argued as follows:-

1. That the High Court failed to re-evaluate the evidence on record

2. (a) That the standard of proof in a criminal trial was not attained

(b) That the conviction was against the weight of evidence

(c) That the appellant's defence was not considered.

3. That the appellant did not have a fair trial in terms of Article 50(2)(h) of the Constitution.

Mr. Mokaya, learned counsel for the appellant submitted that as the first appellate court the High court ought, but failed, to analyse the evidence of identification presented before the trial court thereby arriving at a flawed decision on this point.; that as a result of that failure the learned Judges misdirected themselves in finding that there was light from a nearby petrol station without the evidence of the investigating officer confirming the fact of the proximity of the petrol station to the scene of crime; and that the learned Judges failed to examine the evidence on identification against the test enunciated in **R v Turnbull (1976) 3 All ER 549.**

Counsel further submitted that the standard of proof was not met by the evidence on record as the evidence fell short of the threshold of proof beyond any reasonable doubt. Finally it was contended on behalf of the appellant that his unsworn defence denying involvement in the commission of the offence was not considered.

The appeal was opposed by the respondent represented by Mr Jami Yamina, the Principal Prosecution Counsel. In his view the identification of the appellant which was the question at the heart of the trial, was proper and the two courts below committed no error in so finding; that the overwhelming prosecution evidence displaced the mere denial of involvement by the appellant.

The duty of this Court in terms of **section 361(1)** of the Criminal Procedure Code as the second appellate court is confined only to consideration of issues of law and not matters of fact that have been considered by the trial court and re-evaluated by the first appellate court. See **M'Riungu v R** (1983) KLR 455. The Court has no jurisdiction to retry the case and will only interfere with the concurrent findings of the two courts below on matters of fact if it is apparent on record that no reasonable tribunal could have reached that conclusion. We therefore regurgitate the evidence only to provide the background for considering the grounds argued in this appeal, which indeed raise questions of law.

On 4th December, 2007 at about 7.00 p.m. the complainant in the first count, Samuel Kagwi Ngure, a scrap metal dealer at Changamwe was taking account in his yard with his two employees, namely the complainant in the second count and another when a gang of four robbers struck. One of the robbers who was identified by the two complainants as the appellant was armed with a pistol. They also maintained that it was the appellant who issued instructions ordering them to lie down; that they were enabled by the light from the nearby petrol station to properly see the robbers and more so the appellant who stood infront of them; that indeed it is the same source of light that they were using while taking account immediately before the robbery. In the process of the attack the complainants lost cash amounting to Kshs.35,000/-, ATM cards and mobile phones.

It was the case for the prosecution that during the attack the robbers used personal violence against the complainants and thereafter fled. A report was promptly made to the police station in which the complainants informed the police that they would be able to identify the robbers. Three days later the investigating officer, acting on intelligence arrested the appellant. An identification parade was immediately mounted at which both complainants were able to pick out the appellant.

The appellant for his part denied involvement as explained earlier – insisting that his arrest together with other people while doing electrical fittings in a certain bar within Changamwe area was without basis.

The only broad issue before us for determination, bearing in mind our jurisdiction, is the question of identification, because the attack was at night, the appellant was not known to the complainants before this date, and because the appellant denied involvement.

Identification in a criminal trial is inevitably a question of law. See **Francis Kariuki Njiru & 7 others v R Criminal Appeal No.6 of 2001.** It is equally settled that where the case against an accused person depends on the correctness of his identification, the trial court must exercise caution before convicting in reliance on the evidence of identification because of the likelihood of a mistake. See **Turnbull** (supra). The court must, for that reason examine closely the circumstances in which the identification by the witnesses came to be made.

The robbery, we reiterate, took place at 7.00 p.m. Both courts below made concurrent finding of fact that it was dark. On our part, we are, however, for the following reasons, satisfied that although it was night time and the robbers were strangers to the complainants, they were positively identified. There was light from a nearby petrol station which the complainants were using to balance the business books of account as, according to them it was *"very strong"* and *"very high"*. *T*he appellant who was armed with a pistol stood right infront of the two complainants and talked to them. He was not wearing any disguise at all. The complainant in the first count was able to describe the appellant's physique and dress. He also confirmed that he noted the physical appearance of the appellant since the robbery lasted between 5 to 10 minutes.

Fifteen (15) minutes later the complainants made a report to Changamwe Police Station. The police confirmed that indeed the two complainants gave a description of their assailants.

Three days after the robbery the complainants had no difficulty in picking out the appellant in a police identification parade.

Like both courts below we are of the firm persuasion that the appellant, in the company of three others, armed with a pistol, stole cash and various items from the complainants and another, and in the course of the robbery threatened them with personal violence. The offence under **section 296(2)** of the Penal Code was complete and proved to the required standard while the appellant's defence was properly rejected.

Article 50(2)(h) of the Constitution which is alleged to have been violated provides as follows:-

> ***"50 (2) Every accused person has the right to a fair trial, which includes the right –***
>
> ***…….***
>
> ***(h) to have an advocate assigned to the accused person by the State and at the State expense, if substantial injunction would otherwise result, and to be informed of this right promptly."***

The above provision embodies two rights; the right to counsel at the expense of the State and the right to be informed of this right. This right is subject to further limitation, namely, counsel will be provided as aforesaid only if it is demonstrated that "substantial" injustice would otherwise result. This Court in **David Njoroge Macharia v R Criminal Appeal No. 497 of 2007** identified the following as instances envisaged by the above provision;

> ***"Cases involving complex issues of fact or law, where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence."***

The court concluded;

> ***"We are of the considered view that in addition to situations where "substantial injustice would otherwise results", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."***

Like the appellant in **David Njoroge Macharia v R** case (supra) the appellant herein was tried in the year 2008 before the promulgation of the 2010 Constitution and was, as a result, not entitled to the protection of **Article 50(2)(h)**. Instead his case fell within **section 77(2)(d)** as read with **sub-section (14)** of the former Constitution that;

> *"(2) Every person who is charged with a criminal offence –*
>
> *(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;*
>
> ……
>
> *"14. Nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense",*

Quite the reverse of **Article 50(2)(h)** aforesaid.

We find no merit in the appellant's grounds of appeal and accordingly dismiss this appeal in its entirety.

Dated and delivered at Mombasa this 15th day of May, 2015.

ASIKE-MAKHANDIA

……..……..

JUDGE OF APPEAL

W. OUKO

…….……

JUDGE OF APPEAL

K. M'INOTI

……..…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR