IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA)

CRIMINAL APPEAL NO. 55 OF 2013

BETWEEN

DOMINIC SHIBIA OMULUBI …….....……..…….. APPELLANT

AND

REPUBLIC …….....……..…….. RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega, (Lenaola & Onyancha, JJ.) dated 19th January 2012, in High Court Criminal Appeal No.99 of 2009)

JUDGMENT OF THE COURT

1. The appellant was arraigned before the Senior Resident magistrate's Court, Butere, on a charge of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code.*** The particulars of the charge were that on the 16th day of January, 2007 at Shitaha Village, Shistosa Sub Location, Butere District, jointly with others not before court, while armed with dangerous weapons namely, pangas and knives, robbed ***Ariya Omutanyi Kitswa***, PW1, of his mobile phone, a wrist watch and cash K.Shs.2,000/= and at or immediately before or immediately after the time of such robbery used personal violence against the said person.

2. After a full trial, the appellant was found guilty, convicted and sentenced to death as by law provided.

3. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court of Kenya at Kakamega. The High Court upheld the conviction and sentence and thus dismissed the appeal in its entirety.

4. This is therefore a second appeal and by dint of the provisions of ***section 361 (1)*** of the ***Criminal Procedure Code,*** our jurisdiction is limited to matters of law only; unless it is shown that there was misdirection in the treatment of the facts or that the conclusions arrived at could not be reached by a reasonable tribunal, or that the High Court, as a first appellate court, abdicated its duty of analyzing and re-appraising the evidence to reach its own conclusion. See ***ALEXANDER LIKOYE MULIKA V REPUBLIC*** [2015] eKLR.

5. The appellant's conviction was largely based on evidence of his recognition by PW1 and recovery from the appellant's house of some of the items allegedly stolen from (PW1) nearly four months after the date

of the robbery. What was that evidence?

6. PW1, who was the Chief of Butere Township Location, testified that on the material night at about 9.00p.m. he was on his way home when four people accosted him and commanded him to sit down. At that time, PW1 shone his torch and its light was focused on the face of one of the assailants. PW1 recognised that person as ***Joseph Omulubi Shitsia*** alias J.J, also known as Dominic Shibia, the appellant. And those are the names that PW1 gave to the police when he recorded his statement on 30th January, 2007, long before the appellant was apprehended.

7. At the time of the robbery, PW1 said he had a torch, rungu, a Somali sword that had a place that was welded, a watch, a mobile phone and K.Shs.3,000/=. PW1 told the trial court that the torch light was bright because he had replaced the three old batteries in it with new ones on the day of the attack.

8. After the robbery the appellant went underground. He was however arrested from his home on 21st April, 2007. Shortly before his arrest, the appellant had taken off when he saw ***David Yona Omusinde (PW 3)*** and ***Zablon Opanda, PW 4,*** the area Assistant Chief, approaching his home, but with assistance of some other people they were able to apprehend him. Several items were recovered from the house of the appellant. PW 1 was able to identify his Somali sword and the rungu that he had been robbed of, although the other items that he had on the material night were not recovered.

9. In rejecting the appeal, the High Court held that the appellant had been properly recognized by PW 1 and added that the evidence of recognition was corroborated by the evidence of recovery of the Somali sword and the rungu that had been stolen from PW 1.

10.The appellant's appeal before this Court was premised on several grounds as follows:

i. ***"The learned judges erred in both law and fact in upholding the conviction of the appellant when the evidence on record clearly show that the prosecution had failed to prove their case beyond reasonable doubt.***

ii. ***The learned judges erred in law and in fact in failing to find that the identification of the appellant was improper and not in accordance to the law.***

iii. ***The learned judged (sic) erred in law and in fact in failing to find that the trial court did not warn and/or caution himself (sic) on the dangers of convicting the appellant on the evidence of a single identifying witness.***

iv. ***The learned judges erred in law and in fact in finding that the evidence of identification was corroborated by the recovery of a Somali sword taken from the complainant during the incident.***

v. ***The learned judges erred in law and in fact in making findings that were not supported with the evidence on record.***

vi. ***The learned judges erred in law and infact in upholding the conviction of the lower court without carefully re-evaluating the evidence on record as required by law and failed to find that the conclusions of the trial court were not based on the established facts or evidence on record.***

vii. ***The learned judges erred in both law and fact by failing to put weight to the testimony and/or evidence of the appellant thereby denying the appellant a fair hearing."***

11. **Mr. Jamsumbah,** learned counsel for the appellant, argued all the grounds globally. He faulted both the trial court and the first appellate court for relying on uncorroborated evidence of a single witness regarding identification of the appellant to found a conviction. Counsel submitted that there was insufficient identification evidence, given that the offence was committed at night and it was doubtful whether the complainant was able to see his attackers well. He added that an identification parade should

have been conducted.

12. Mr. Jamsumbah further submitted that PW 1 never told the trial court that he had been robbed of the items that were stated on the charge sheet. He said that the complainant merely told the trial court that at the time of the attack he had a torch, rungu, Somali sword, watch, phone and K.Shs.3,000/=. Without an express statement from the complainant that the said items were violently stolen from him, the charge of robbery with violence could not lie, counsel contended.

13. Regarding the items that were allegedly recovered from the appellant, his counsel submitted that there was no proof that the Somali sword was the one that PW 1 had been robbed of. As for the rungu, Mr. Jamsumbah submitted that the charge sheet did not state that there was any such item that had been stolen from PW 1.

14. On his part, ***Mr. Sirtuy,*** Principal Prosecution Counsel, on behalf of the respondent, urged the Court to dismiss the appeal, saying that both the trial court as well as the High Court had carefully analysed all the evidence on record and reached proper conclusions.

15. Regarding the evidence of PW 1, Counsel submitted that the witness was categorical that he had clearly recognized the appellant, having shone bright torch light on his face. The complainant knew the name of the appellant and also recognized his voice and he so stated to the police when he recorded his statement.

16. Mr. Sirtuy told the Court that even if the record of appeal did not show that PW 1 had expressly stated that he had been robbed of the items as stated on the charge sheet, by inference, it can reasonably be deduced that he was so robbed, having been viciously assaulted by his attackers.

17. Lastly, Mr. Sirtuy submitted that the evidence of PW 1 regarding identification of the appellant was well corroborated by the evidence of recovery of his stolen items from the house of the appellant.

18. We have carefully considered all the grounds of appeal, even if we have not set out in extenso the oral submissions by counsel. It is trite law that although a fact may be proved by the testimony of a single witness, there is need to test with the greatest care the identification evidence of such a witness, especially when it is shown that the conditions favouring a positive identification were difficult. See ***MARUBE & ANOTHER V REPUBLIC, [1986] KLR 356; MAITANYI V REPUBLIC [1986] KLR 198.*** In the latter case, it was held that the trial court must warn itself of the danger of relying on the evidence of a single identification witness, and that must be done when the evidence is being considered and before the decision is made.

19.The gravamen of this appeal is that the trial court, without warning itself of the attendant danger, relied on uncorroborated evidence of a single identifying witness, PW 1, to found a conviction. It was further submitted that the High Court fell into the same error, though it warned itself of the danger of affirming the trial court's conviction on such evidence. Such warning on the part of the first appellate could not cure the error committed by the trial court, the appellant's counsel stated.

20.Our appreciation of the evidence on record is that PW1, with the aid of bright torch light, was able to identify, nay, recognize, the appellant as one of his assailants. PW1 had known the appellant prior to the said incident. He saw him clearly and heard his voice. He even knew his name and he stated so in his statement to the police. We do not agree with Mr. Jamsumbah's submission that there was need for an identification parade to be conducted to see if PW 1 was able to pick out the appellant. Such identification parade would have been superfluous. See ***AJODE V REPUBLIC [2004] 2 KLR 81.***

21. Evidence of recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant, it was so held in ***ANJONONI & OTHERS V REPUBLIC [1981] KLR 594.***

22. We agree with Mr. Sirtuy that the evidence of the appellant's recognition was corroborated by

recovery of PW 1's Somali sword and rungu from the house of the appellant. The Somali sword had a unique welding mark which enabled PW 1 to identify it. He also said that the rungu had a wedge shape and that is how he identified it. As noted by the High Court, it was unclear whether what was recovered was a rungu or a walking stick as stated in the charge sheet. That notwithstanding, no miscarriage of justice was occasioned by reliance on the evidence of recovery from the appellant's house of at least one undisputed item, the Somali sword, that belonged to the complainant.

23. Although Mr. Jamsumbah submitted that PW 1 did not expressly testify that he had been robbed of the items that are recorded in the charge sheet, which we agree, we entertain no doubt that he was so robbed. His attackers inflicted multiple cuts on him and he was hospitalized for about five months. The first two days after the attack he was unconscious. When he came round he must have realized that there were several things that he had before the attack that had gone missing. They must have been stolen by his assailants, we so believe.

24. All in all, we find no merit in this appeal and dismiss it in its entirety.

DATED AT KISUMU THIS 3RD DAY OF JULY, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR