IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 80 OF 2014

BETWEEN

HAMADI ALI MWAMREZI……..……1ST APPELLANT

SAID RAMA TENGA……2ND APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero &Muya, JJ.) dated 13th August, 2013

in

H.C.CR.A. Nos.247&248 of 2006.)

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JUDGMENT OF THE COURT

The appellants lodged a second appeal in this Court on 30th June, 2014 through homemade grounds *of appeal* and later through **J. Gichira Esq**, Advocate filed supplementary grounds of appeal on 16th September, 2015 against their conviction and sentence for the single offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The offence (upon conviction) carries a mandatory death sentence to which the appellants were condemned following their conviction. The conviction turned on the events of 31st December, 2004 involving the appellants and one, **Georgina Siele** (PW1). It was claimed that on the material day at about 12 noon in Tiwi Location of Kwale County, the appellants being armed with a dangerous weapon namely a knife, jointly robbed PW1 of her handbag, cash Kshs.3,300/=, an identity card, a Post Bank book and a mobile phone make *Motorolla*, all valued at Kshs.8,920 and or immediately before or immediately after the time of such robbery used personal violence on the said PW1.

To answer to the charge, the appellants were initially separately charged. Whereas the 2nd appellant was first arraigned before the Senior Resident Magistrate's Court at Kwale on 28th January, 2005 the 1st appellant was on the other hand brought before court on a date which is not evident on record. However on 22nd September, 2005, the two cases were consolidated, and a fresh charge sheet was submitted

wherein the 2nd and 1st appellants were named as 1st and 2nd accused respectively. They denied the charge and a plea of not guilty was entered. The hearing soon thereafter commenced before the trial magistrate, **D. M. Ochenja**, Senior Resident Magistrate and after the close of the prosecution case following adduction of evidence from seven witnesses, the trial magistrate found that the appellants had a case to answer and placed them on their defence. They all elected to make unsworn statements of defence and called no witnesses. They denied involvement in the crime. In fact, the 1st appellant advanced *alibi* defence whereas the 2nd appellant claimed to have been a victim of circumstances and or mistaken identity.

In a reserved judgment delivered on 21st September, 2006, the trial magistrate found the charge against the appellants proved beyond reasonable doubt, convicted them and sentenced them to death following mitigation.

Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court sitting at Mombasa. The appeal was in the fullness of time heard and determined by **Odero** and **Muya, JJ**. The High Court dismissed the appeal and upheld the appellants' conviction and sentence. That determination precipitated this appeal which is in the nature of a second and perhaps last appeal.

The appellants were represented in this appeal by **J. Gichira, Esq**, Advocate who was led by **Mr. Obara**, learned counsel. As already stated, Mr. Gichira, filed six supplementary grounds of appeal in which he contended that the learned Judges:

> i. fell into error when they confirmed the trial court's verdict whereas there was no conclusive evidence that had been adduced to warrant such finding;
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> ii. ought to have found that the identification was difficult in the circumstances;
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> iii. ought to have found that there was no proper identification of the appellants;
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> iv. ought not to have upheld the decision of the trial court when adequate description of the appellants had not been given; and finally,
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> v. erred by imposing the death sentence upon the appellants in contravention of the provisions of Section 74(1) of the Constitution.

Although Mr.Obara, had initially indicated that he would rely on both the homemade grounds of appeal as well as the supplementary ones, when he urged the appeal it became clear that the appeal turned solely on the supplementary grounds of appeal which revolved around the identification and or recognition of the appellants. Indeed at the tail end of his submissions, he even abandoned the ground challenging the imposition of the death penalty on the appellants. Counsel submitted that the appellants were not properly identified, and that the circumstances of attack though in broad daylight were such that PW1 could not have been able to identify or recognize any of the appellants. According to counsel, that was one of the reasons perhaps why PW1 was unable to give a description of her attackers to the first responders. Counsel further submitted that there was no evidence as to how long the attack lasted or from which direction the attackers accosted PW1. That though following the attack, the 2nd appellant was soon arrested from the bush or thicket nearby, he could have been a victim of mistaken identity having been in the bush going about his own business. Finally, counsel submitted that in any event the evidence of identification was not corroborated.

With regard to the arrest of the 1st appellant, counsel submitted that he was arrested three months after the incident. That there was absolutely no explanation as to why it took that long for this appellant to be arrested, yet, PW2 claimed to have recognized him and knew where he resided. Counsel further submitted that the evidence suggested that the 1st appellant was implicated in the crime by the 2nd appellant. That other than that, there was nothing linking the 1st appellant to the crime. Accordingly, no nexus between the 1st appellant and the crime was established by the prosecution.

Mr. Kiprop, learned Principal Prosecution Counsel opposed the appeal and contended that there was no possibility of the appellants being victims of mistaken identity. The offence was committed in broad daylight at about noon and at a bus stage. That immediately after the attack, PW1 screamed and gave chase to the attackers. He was joined in the chase by PW2 who knew the attackers. That this was evidence of recognition as opposed to visual identification. Accordingly, there was no possibility of mistaken identity. That PW1 and PW2 confirmed that the 2nd appellant was arrested immediately after the incident. That the offence having been committed by two people, the ingredients of robbery with violence were met.

By dint of Section 361 of the Criminal Procedure Code, a second appeal to this Court is restricted to matters of law only. This statutory imperative has been emphasized by this Court in successive decisions. For instance in the case of **Njoroge v Republic [1982] KLR 388**, this Court opined with regard to a second appeal that:-

> **"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the Court is bound by the concurrent findings of facts made by the lower courts unless those findings were not based on evidence….."** *or that*
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> - The findings were a pervasion of the evidence tendered or
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> - That this Court is satisfied that on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such decision.

We will bear the above injunctions as we consider over this appeal.

However, before we delve into the merits or lack thereof in this appeal, it is perhaps necessary to put in perspective, the facts informing the appellants' arrest and subsequent arraignment and prosecution in the trial court. PW1 was a sales representative with Bixa Company Kenya based at Tiwi in Kwale County. On 31st December, 2004 at around noon, she was waiting for a vehicle to ferry her to Mombasa. While at the stage, two men suddenly emerged from a nearby bush and accosted her. One of them ordered her to surrender the handbag she was carrying. According to PW1, the order was issued by the 1st appellant. She defied the order and started screaming but the two men could not be cowed. Instead they grabbed her and a struggle ensued. One of them pulled out a knife and threatened to stab her. It was, according to her, the 2nd appellant. Indeed he went ahead and cut her bag and finger and both men then fled back into the bush with the bag. Her screams attracted the attention of the security guard at her nearby place of work, **Juma Mwangambo** (PW2) who rushed to the scene. He saw the two men running away towards the bush and pursued them in the company of other members of public and police on patrol led by **Ag. I.P. Emmanuel Okonda** (PW4), who had similarly been attracted by PW1's screams. From the bush they managed to flush out one of the two men. That man was the 2nd appellant. However, the 1st appellant managed to make good his escape. Upon arrest the 2nd appellant was positively identified by PW1, as one of those who had just robbed her moments ago. Following the recognition of the 1st appellant by PW2 as well as the description of him given by PW1 to the police officer, the police officers went about looking for him to no avail. However, three (3) months or so later **Omar Ali** (PW6) the chairman of the Local Policing Committee and **Hamisi Mohamed** (PW6) a member of the same committee who were familiar with the 1st appellant and were in the know regarding the crime he had committed on PW1 in the company of the 2nd appellant, acting on a tip-off from members of the public, raided the 1st appellant's house where they found him sleeping. They duly arrested him and took him to Diani Police Station and was received by **PC Richard Matoke** (PW7) who re-arrested him. The two were subsequently charged with the offence.

Back to the merits of the appeal. On identification of the appellants, we appreciate that this was evidence of both visual identification as well as recognition as correctly submitted by the respondent. PW1 visually identified the appellants whereas PW2 recognized them. According to PW2, the 2nd appellant was a former employee of Bixa where he had worked for over five (5) years from whence he had known him. PW2 also knew that he hailed from Tiwi where the witness also resided. It is instructive that these

assertions were not contested at all. Accordingly, he knew the appellants very well. Similarly, he knew the 1st appellant with whom he had interacted on several occasions.

As for PW1, she identified each of the appellant because first and foremost, the offence was committed in broad day light; they were in close proximity as they engaged in the struggle over the handbag and even spoke to each other as she pleaded with them not to kill her. The struggle took some time which accorded her was sufficient time to observe the appellants as to be able to identify them subsequently. Thereafter when she recorded her statement with the police, she was able to give a description of the 1st appellant to the police.

It is not in dispute that the offence was committed in broad daylight at a bus stage. PW1 was alone at the stage. From her evidence which was not seriously challenged, she had ample time to identify the appellants as she was not distracted from any quarter. They also pushed and pulled her in a bid to get her hand bag.

In between they argued with her. They were thus locked in close encounter and or proximity, which afforded her good opportunity to see them clearly. It is instructive that the appellants had not disguised themselves at all as to make their identification difficult. Further, the 2nd appellant was arrested a few metres from the scene and in the view of PW1 who positively identified him. Later, she gave a description of the 1st appellant to the first responders and police. It is on the basis of that description that the appellant was tracked down and eventually arrested. In the premises, the submissions that the 1st appellant was never identified and or his description given does not hold at all. He was identified and recognized by PW1 and PW2 respectively. Given the circumstances obtaining at the scene of crime as outlined above, we are satisfied just like the two courts below, that the identification and recognition of the appellants would not have been difficult and or mistaken.

As already stated, it was not long after the incident that the 2nd appellant was arrested from the bush where he had dashed into with PW2, PW4 and other members of the public in hot pursuit. According to both witnesses, there was no possibility of the 2nd appellant having been a victim of mistaken identification. During the pursuit, they never lost sight of him. According to PW2, this is how the events unfolded with regard to the arrest of the 2nd appellant. Under cross- examination PW2 stated:-

> **" ……..I saw you running towards the bush. I know you. You hail from Tiwi. You worked with Bixa for five years. What I have stated is the truth. You ran towards the forest…….I pursued you. You threatened to stab me with a knife…….I hestiyated (sic) abit when you produced a knife. You then ran away. We once more pursued you…….I am the one who arrested you with the help of police officers…… "**

In the case of **Ali Ramadhan v Republic, Criminal Appeal No. 79 of 1985** (UR), this Court held:-

> **"……..The identification of a person who took part in the alleged offence was chased from the scene of crime to the place where he was arrested is of course strong evidence of identification and if all the links in the chain are sound, it may be safely relied upon….."**

In the instant case, it is clear that PW2 and PW5 pursued the 2nd appellant without losing sight of him until they arrested him in the bush not so far from the scene of crime. There was thus no break in the chain. Besides the chase, PW2 already knew the appellants. Soon after the arrest, PW2 immediately identified 2nd appellant as one of the persons who had just robbed PW1. The time taken to chase, arrest and for PW1 to confirm that the 2nd appellant was one of the robbers was too short for the appearance of this appellant to have been erased or dissipated from her memory. In the same vein, it is a long shot to submit that the 2nd appellant was in the said bush going about his own business and therefore a victim of mistaken identity. In the premises, PW1 could not have mistaken the appellant for someone else. A word

of caution though on this kind of evidence was expressed by this Court in the case of **Maurice Makanga Kolia v Republic Criminal Appeal No. 191 of 2003** (UR) thus:-

> **"…….We are cognizant that where a robber is arrested after a robbery by a person or a group other than the one chasing him, it cannot be assumed that he is the person who had robbed unless there is evidence of identification……"**

Fortunately, this is not the situation obtaining here. Indeed the appellant does not deny having been arrested at the scene. His defence was that he was a victim of mistaken identity and that he was at the wrong place at the wrong time. That defence was duly considered by the two courts below and found wanting. We have no basis to depart from that concurrent finding.

The other issue raised by the appellants is that the evidence of identification as well as recognition was not corroborated. We are not aware of such legal requirement. And even if there was such requirement, the same was provided by PW2 and PW4.

However, what has caused us anxiety is the fact that the 1st appellant was arrested three or so months after the incident. He has sought to capitalize on this delay to advance the argument that he had not been identified by PW1 and or recognized by PW2. That anxiety is ameliorated somewhat by what PW2 and PW5 stated in evidence in this regard. PW2 under cross-examination by the appellant stated thus:

> **"……..I saw two people running away. I saw you carrying or running with the complainant's bag. Hitherto, I had seen you. I have seen you more than three times. I positively identified you. I mentioned your names to police. The 1st accused also implicated you. The 1st accused took police to your home. You were never found at home. Your name was circulated to the home guards…….**

As for PW5, he stated in his evidence in chief which was not challenged at all that:-

> **" ……..I can recall on 21/3/05 at 11.00 a.m. I was in the office when I received a report to the effect that the 2nd accused whom we had been looking for had been seen somewhere. Hitherto, we had received a report to the effect that the 2nd accused had been involved in a robbery incident…"**

It would appear therefore that soon after the incident, the 1st appellant went into hiding and made it almost impossible for him to be arrested in good time. Nothing therefore turns on this complaint in our view.

That aside and as correctly observed by both courts below, there was no reason or basis upon which PW2 would bear false testimony against the appellants. We agree with this concurrent finding which we must pay **homage and allegiance** to.

Of course we are alive to the fact that on the question of identification even the most honest of witnesses can be mistaken when it comes to such evidence. See **Kamau v Republic [1975] EA 139**. Accordingly, a conviction on evidence of recognition or visual identification should only ensue when it is crystal clear and when there is no room for doubt.

The evidence must be beyond suspicion, speculation or even assumption and must irresistibly point to the accused as the perpetrator of the crime. As this Court aptly rendered itself in **Cleophas Otieno Wamunga v Republic [1989] KLR 424:-**

> **"……..Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he**

alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant. The way to approach the evidence of visual identification was succinctly stated by Widgery C.J. in the well known case of R. v. Turnbull [1976] 3 ALL E.R 549 **at page 552 where he said:-**

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

We have circumspectly pondered over the record of appeal and we are satisfied that on the evidence on record, there can be no doubt that the appellants were positively identified by PW1 and recognized by PW2. There was therefore no possibility of mistake or error in that regard.

In the circumstances, the inevitable conclusion we have come to is that this appeal lacks merit and is accordingly dismissed in its entirety.

Dated and delivered at Mombasa this 16th day of October, 2015

ASIKE-MAKHANDIA

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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