IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & SICHALE, JJA.)

CRIMINAL APPEAL NO. 111 OF 2009

ROBERT MWANGI NJOROGE … APPELLANT

AND

REPUBLIC……...……..…… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Justice J. B. Ojwang & H.A. Omondi, JJ) dated 8th May 2009 in **H.C.CR.A. NO. 490 OF 2006)**

JUDGMENT OF THE COURT

The appellant **ROBERT MWANGI NJOROGE** (the then 1st accused) together with **SELESTIN SALIM SWAI** (the then 2nd accused) were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the 21st day of May, 2005 at Uthiru in Nairobi within the Nairobi Area jointly with others not before the court, while armed with knives robbed

VIRGINIA WANJIRU MUGAMBI of her cash Kshs. 2,700/=, a mobile phone make Panasonic X-100 serial No: 354144001659604 and (sic) Ukay uniform all valued at Kshs. 20,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **VIRGINIA WANJIRU MUGAMBI**.

The trial commenced on 11th August 2005 before Hon. Muchira, the then Senior Resident Magistrate, Kibera, who recorded the evidence of **PW1 VIRGINIA WANJIKU MUGAMBI, PW2 JAMES KIMONDO NGUNJIRI** and **PW3 Pc LEONARD MUA**. The trial was thereafter taken over by Hon. Wasilwa, the then Principal Magistrate, Kibera, who on 5th April, 2006 recorded the evidence of **PW4 IP MOHAMMED WAKO** and **PW5 CPL JOHN WANYONYI.** On 22nd June, 2006, she recorded the evidence of **PW6 DR. ZEPHANIA KAMAU** as well as for PW1 when the latter was recalled to testify.

In a ruling delivered on 7th July 2006 the trial court found that the appellant and the then 2nd accused had a case to answer. In their defences, each of the accused persons elected to make sworn statements and each denied the charges leveled against him.

In a judgment rendered on 29th August 2006 the trial court found the 2nd accused guilty of the offence of handling stolen property contrary to Section 322 of Criminal Procedure Code and sentenced him to three years imprisonment. On the other hand, the appellant was found guilty of the offence of robbery with violence contrary to section 296(2) of the penal code and was sentenced to death as by the law prescribed.

It is on the basis of this conviction and sentence that the appellant filed an appeal in the High Court. In a judgment dated 18th May 2009 Ojwang, J (as he then was) and Omondi J dismissed the appellant's appeal thus precipitating this appeal.

In an amended supplementary memorandum of appeal filed on 17th July 2015 the appellant listed no less than 17 grounds of appeal. However, most of these were repetitive and can be summarized as follows:-

i. ***The learned judges failed to evaluate the evidence***

ii. ***The charge against the appellant was not proved beyond any reasonable doubt.***

iii. ***The identification parade was flawed.***

During the plenary hearing before us on 20th July 2015 Mr. Kariu, learned counsel for the appellant submitted that there was variance between the charge sheet and the evidence. It was counsel's contention that whereas the charge sheet gave the date of the commission of the offence as 21st May 2005, PW1 told the court that she was attacked on 21st May 2005 at 1.00 am and reported to the police on 22nd May 2005. Secondly, the appellant's counsel faulted the identification parade. Counsel submitted that PW1 purported to have identified the appellant in the locus in quo but that when she was recalled to testify on 22nd June 2006 she told the court that she recognized the appellant as she had known him before. It was counsel's conclusion that the charge against the appellant was not proved beyond any reasonable doubt.

Mr. Kivihya, the learned State Counsel opposed the appeal. He refuted the contention that there was variance between the charge sheet and the evidence as according to him, if the offence was committed on 21st May 2005 at about 1.00 am the following morning would still be 21st May 2005 and not 22nd May 2005. It was his further view that the identification parade was safe as PW1 spent ample time with the assailants and was able to describe their clothing and that indeed the appellant had wanted to stab her but he was dissuaded by the others. According to Mr. Kivihya, there was sufficient electric light from the nearby building that enabled PW1 to see the appellant. On the issue of recognition, it was Mr. Kivihya's submission that besides the identification at the parade, PW1 indicated that she used to see the appellant where she used to take her shoes for repair and this is where the appellant was arrested from. Finally, he asked us to consider that this is a second appeal and that the concurrent findings of the lower court ought not to be disturbed.

This being a second appeal, our mandate is as stated in **Section 361** of the Criminal Procedure Code, to wit:

> ***"361(1) A party to an appeal from a subordinate court may subject to sub-section (8), appeal against decision of the High Court in its appellate jurisdiction on a matter of law, and the Court o Appeal shall not hear an appeal under this section:-***
>
> a. ***on a matter of fact, and severity of sentence is a matter of fact; or,***
>
> b. ***against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

The above provision of the law was amplified in the case of **Hamisi Mbela & Another v Republic** Mombasa **Criminal Appeal No. 319 of 2009 (UR)**

wherein this Court held:-

> ***"8. This being a second appeal, this court is mandated under section 361 (1) of the Criminal Procedure Code to consider only issues of law. As was held in*** *M'Riungu vs Republic [1983] KLR*
>
> *445.* ***Where right of appeal is confined to questions of law, an appellate court has loyalty to***

accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law *(Martin v Glyneed*

Distributors Ltd (t/a MBS Fastenings)."

Simply put, our jurisdiction as a second appellate court is confined to matters of law unless it is shown that the first appellate court failed to re-analyze and re-evaluate the evidence. In other words, it has to be shown that the court erred in the conviction as there was no sufficient evidence to warrant a conviction. Therefore, the issue for our determination is whether the High Court failed to re-analyze and re-evaluate the evidence of the trial court and thereby confirming the conviction when it ought not to have done so.

From the record, PW1 testified on 11th August 2005 as well as on 22nd June 2006 when she was recalled. On 11th August, 2005 she told the trial court that on 21st May, 2005 at about 1 a.m. she was on her way home when she was accosted by a total of six men. It was raining on this particular night but she stated that she was able to see the six men with the aid of security lights emanating from" big bulbs" of a building. On 26th May 2005 she identified the appellant in an identification parade. Whilst being cross-examined by the appellant, she did reiterate that she gave the description of the attackers to the police. However, in her testimony on 22nd June 2006 when she was recalled, she stated thus:

> ***"I had seen accused 1 as common people of Uthiru*** (sic). ***He was a taxi liar (sic) person."*** Whilst in re-examination she stated:-
>
> ***"I identified accused 1 on parade. I can still identify other 5 if I saw."***

In the judgment of the trial court, the learned Principal Magistrate after restating the evidence found the appellant guilty on the basis that:

> ***"…… there were circumstances favouring identification given the electricity light at scene. The identification parade was also conducted well and accused 1 was satisfied with it."*** *1* ***"…….. have warned myself of the dangers of convicting on evidence of a single identifying witness but nonetheless I found,*** *(sic)* ***accused 1 was properly identified and I find prosecution have proved the main Court against 1 (sic) and I convict him vide*** *(sic)* ***Section 215 of Criminal Procedure Code."***

In its evaluation of the evidence, the High court concurred with the findings of the trial court and found that the appellant spent some time with the attackers and that there was light from the "big bulbs" of a building. The High Court further proceeded to find that the appellant:

> ***"……. was not a stranger to her – indeed she said he was familiar person who was common in Uthiru – so that it was beyond just simple identification, it was recognition of someone she used to see before."***

With greatest respect to the two judges of the High Court, it is our view that this conclusion was erroneous as the High Court ought to have found that where there is recognition then there is no need for an identification parade. Indeed, recognition and identification are mutually exclusive and it can never be that a case is made much stronger by both identification and recognition as the learned judges seemed to have been saying in the appeal before them. In our view this was clearly wrong. Furthermore when PW1 testified for the first time on 11th August, 2005 she did not state that she had known the appellant before the incident but that she described her attackers to the police. Neither did she tell the police at the time of making the report that she knew the appellant. When she was recalled to testify on 22nd June, 2005 she alluded to the fact that she used to see the appellant whenever she took her shoes for repair and hence she knew him. If that be so, why did she not make a report to the effect that she knew one of the assailants?

We are of the considered view that indeed if PW1 knew where the appellant operated from, nothing would have been easier than to to say as much and lead the police to the appellant's place of work, which PW1 said she knew. And if PW1 knew the appellant, then there was no need of subjecting the appellant to an identification parade, as this would have been a case of recognition. It was wrong for the High Court to have found that **"…… it was beyond just simple identification, it was recognition of someone she used to see."**

The failure of the High Court to re-evaluate and re-analyse the evidence is further demonstrated by its failure to consider the circumstances that led to the arrest of the appellant by PW3, Pc Leonard Mua. It was PW3's evidence that:

> ***"On 21st May, 2005 at 1 p.m. I was at Uthiiru*** *(sic)* ***shopping centre with Pc Kangethe. We got information there*** *(sic)* ***4 men who had robbed people in the night before members of public identified one Mwangi who's*** *(sic)* ***then a shoe shiner. We arrested the young man and escorted him to police station pending investigations, and handed case over to CID Kabete. I did not meet the complainants (sic) of the robbery. Later I learnt the said Mwangi was positively identified in our (sic) identification parade.***
>
> ***Accused 1 in the dock is the one I arrested."***

It is crucial to note that at the time the appellant was arrested, PW1 was absent. It is the members of the public who said the appellant was a robber. Who are these members of the public who said the appellant was one of the robbers? And how did the High Court treat this evidence? At page nine of the judgment the learned judges stated:

> ***"Appellant further submitted that the failure to call the persons who mentioned him to police officers thus leading to his arrest was fatal. The police officer Pc Mua informed the trial magistrate that the information was from members of the public, which term he explained did not relate to a particular individual, but to the general public – so which particulars witness ought the prosecution to have called when there were no specifics given? Indeed, we concur with Miss Gateru, that the issue of essential witnesses not being called to testify holds no ground as the witnesses who were called were sufficient to prove the case."***

From the above, it is clear that the High Court justified the reasons for failure to call a witness who may have pointed out the appellant at the time of arrest by stating that there was no one to call as the information was from the general public. That may well have been the case but in our view the High Court ought to have found that this was hearsay evidence and hence inadmissible. It is crucial to point out that PW3 arrested the appellant before meeting PW1, whom as he stated he did not get to meet at all. On 26th September, 2005, PW1 picked out the appellant from an identification parade as the assailant. That remained the position until on 22nd June, 2006 when PW1 was recalled as a witness and she said she knew the appellant even before. This state of affairs was unsatisfactory and the High Court erred in not finding that part of the evidence was hearsay. We further find that the admissibility or otherwise of hearsay evidence is a matter of law and hence this further brings this appeal within our mandate.

We believe we have said enough to show that this appeal must succeed. Accordingly, the conviction of the appellant is quashed and the sentence set aside. The appellant is to be released forthwith unless otherwise lawfully held.

Dated Delivered and at Nairobi this 16th day of October, 2015.

E. M. GITHINJI

……

JUDGE OF APPEAL

ALNASHIR VISRAM

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR