IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 78 OF 2012

BETWEEN

HUSSEIN HAMISI MOHAMMED …….…….. 1ST APPELLANT

MOHAMED BAKARI SULEIMAN …… 2ND APPELLANT

AND

REPUBLIC ……..……..……RESPONDENT

(Being an appeal from a judgment of the High Court of Kenya at Mombasa (Odero & Tuiyot, JJ.) dated 7th February, 2012

in

H.C.CR.A. No. 209 of 2009)

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JUDGMENT OF THE COURT

In the early hours of 17th November, 2007 at 5.00 a.m. to be precise, **William Chagusia Luvanga** "*the complainant*" was on his way home at Majengo along Kingorani road Mombasa having alighted from a matatu that had ferried him from Makande estate where he had attended an overnight wake to arrange for the funeral of a member of an association in which he was the organizing secretary. As he trudged along he suddenly heard voices of people behind him. Turning and looking back, he noticed that the voices were of two people who were actually trailing him.

When he picked pace, the two started running after him and upon catching up with him, one of them suddenly jumped on him and held him by the neck as the other frisked his pockets and helped himself to the Kshs.300/- that was in the shirt pocket. The complainant however, could not let his money go that easily. He gallantly fought back by holding on to one of the robbers as he screamed for help. In a bid to free himself, the robber in the complainant's grip directed the other robber who had the panga to cut the complainant. That robber heeded the order, removed the panga and cut the complainant on the head. However, this did not deter the complainant. He still held onto the robber as they pushed and shoved until they fell near a video shop.

In the meantime neighbours who responded to his screams led by **Saida Salmin** (PW2) arrived. Along also came the complainant's wife **Loise Muhonga** (PW3). They found one of the robbers still in the grip of the complainant. They helped to arrest that robber. That robber was none other than the 1st appellant. In the meantime, the other robber made good his escape. The members of the public then took both the complainant and the 1st appellant to Makupa Police Station. At the police station, they were met by **P.C. Ashford Kinyua** (PW5) who re-arrested the 1st appellant and thereafter issued a P3 form to the complainant. The complainant proceeded to Coast General Hospital for treatment of the injuries he had sustained as aforesaid. **Dr. Lawrence Ngone** (PW7) attended to the complainant and later filled the P3 form. He classified the injuries as harm. At the scene of crime and as they struggled, some property belonging to the 1st appellant fell on the ground. These were the wallet, identity card, elector's card as well as some medicines. They were all gathered and on 26th November, 2007 handed over to PW5 by PW3. Armed with this evidence, PW5 charged the 1st appellant with robbery with violence.

In the meantime, as the complainant engaged the robbers at the scene he was able to identify the other robber who ran away. He was able to do so on account of powerful street lights at the scene of crime. Again during the struggle they fell on the ground outside a video shop where there were powerful security lights. At the police station, the complainant gave a description of the other robber who had escaped and his street name as "*Beka*" short for **Bakari**. Apparently, the said robber was a resident of the same estate as the complainant and had after the incident escaped to his grandmother's house at Bamburi. On 5th February, 2008 PW5 was tipped regarding the location of the house of the grandmother. At about 2.00 a.m. he teamed up with police officers from Bamburi Police Station and raided that house and found three people therein. When PW5 called out the name Beka, one of them responded. He was the 2nd appellant. He was duly arrested and escorted to Makupa Police Station. On 6th February, 2008, at the request of PW5, **Chief Inspector Mwangi Kuria** (PW6) mounted a police identification parade, at which the complainant was able to pick out the 2nd appellant as the robber who had escaped after robbing him.

Being satisfied with the evidence in hand, with regard to the 2nd appellant, PW5 proffered a robbery with violence charge against him. On 7th February 2008 the two cases were consolidated and the appellants charged jointly with the offence of **Robbery with violence Contrary to Section 296(2) of the Penal Code,** the particulars being that on 17th November, 2007 at about 5.00 a.m. at Majengo area of Mombasa, in the then Coast Province, they jointly, whilst armed with offensive weapon, namely a panga robbed the complainant of Kshs.300/- and at or immediately after used actual violence on him.

The appellants denied the offence and when put on their defence, they all elected to make unsworn statements of defence and called no witnesses. The 1st appellant claimed that in the wee hours of 17th November, 2007 he was on his way home from a bar at about 4.30 a.m. when he decided to relieve himself in the middle of Kingorani road. As he went about his business, he heard someone ask what he was doing on the road. That person was the complainant. A fight ensued after the complainant without any provocation insulted him. They struggled and both fell down. It is at this point that the complainant started shouting "*thief, thief*" as he held him. Members of the public responded to his shouts, came and assaulted him claiming he was a thief. He was only rescued by a village elder and later taken to Makupa Police Station. He was subsequently arraigned in court over an offence he never committed.

As for the 2nd appellant, his story was that he did not know why he was arrested at midnight from his house at Bamburi on 5th February, 2008 as he slept. He was subsequently taken to Makupa Police Station and two days later charged with an offence he had nothing to do with.

Hon. R. Kirui, Principal Magistrate within the Chief Magistrate's Court at Mombasa having listened carefully to the prosecution and defence cases was convinced that the appellants had committed the offence charged. Accordingly on 3rd November, 2009 he convicted them and sentenced them to death as required.

The appellants immediately lodged their respective appeals to the High Court, Mombasa. At the

hearing the two appeals were consolidated, at the end of which **Odero** and **Tuiyott JJ**. accepted the findings of the trial court, in effect therefore dismissing the appeals.

The setback did not dim the appellants' quest for freedom. On 31st October, 2013 they jointly lodged this second and perhaps last appeal in this Court. They sought to impugn the judgments of the two courts below on the grounds that the charge sheet as framed was defective, evidence was full of contradictions and not corroborative, the sentence imposed was unconstitutional and that their defences were not given due consideration.

At the hearing of the appeal **Mr. Gicharu** and **Mr. Ngumbau**, learned counsel appeared for the 1st and 2nd appellants respectively whereas the State was represented by **Mr. Monda**, learned Assistant Deputy Director of Public Prosecutions.

Urguing the appeal on behalf of the 1st appellant Mr. Gicharu hinged his argument on only two grounds: reliance on the evidence of a single identifying witness and whether the ingredients of the offence charged were proved. Dealing with the first ground, counsel submitted that the entire case turned on the evidence of the complainant and that the said evidence was not corroborated at all. While conceding that the 1st appellant was arrested at the *locus in quo* it was submitted that there was no evidence of the presence of any other person. It was contended the High Court did not warn itself of the dangers of relying on the evidence of a single witness, and that there were contradictions in the prosecution case which should have but were not resolved in favour of the 1st appellant. Urguing the 2nd ground, counsel reiterated that the ingredients of robbery with violence were not met. There was no evidence of presence of any other person at the *locus*, there was no evidence of the offensive or dangerous weapon used or what was stolen in the process. Given the set of circumstances, it was urged, at best this was a case of assault with intent to steal.

On behalf of the 2nd appellant, Mr. Ngumbau submitted that the appeal turned on three main grounds: identification; failure by the High Court to re-evaluate the evidence exhaustively; and thirdly failure to consider the 2nd appellant's defence.

On identification, counsel submitted that though the complainant claimed to have identified the 2nd appellant, the conditions prevailing during the attack were not favourable for positive identification. Therefore the identification of the 2nd appellant could not have been free from possibility of error. Counsel further contended that the courts below did not attempt to interrogate the lighting conditions prevailing at the scene of crime as required by law and **Maitanyi v Republic (1986) KLR 198.** The complainant's evidence that he was cut by a 2nd robber who vanished, did not eliminate the possibility that the complainant never saw the 2nd appellant. Although PW5 testified that he arrested the appellant on the basis of the street name "*Beka*", it was argued the complainant did not testify as to whether he knew the appellant's nickname and or his place of abode as testified to by PW5. If indeed the complainant knew the 2nd appellant, counsel pressed, then the identification parade mounted by PW6 was superfluous. If such evidence is discounted, then the evidence of identification will be that of dock identification which is worthless. In support of this contention, counsel relied on the case of **Gabriel Kamau Njoroge v Republic (1982 - 1988) KAR 1134**. Counsel also questioned why the two courts below did not address the fact that this was a case of a single identifying witness and the dangers of relying on such evidence. In support of this complaint counsel relied on **Wamunga v Republic (1989) KLR 424** and **Roria v Republic (1967) EA 583.**

Responding, Mr. Monda submitted that the ingredients of the offence charged were met as the robbers were two and that the 1st appellant was arrested red handed at the locus. On the lighting conditions obtaining at the scene of crime, counsel submitted that there were street and security lights. In the premises, it was argued, the High Court was right in holding that the conditions were favourable for positive identification of both appellants. In respect of the 1st appellant, evidence placed him at the scene of crime. There were concurrent findings of the two courts on this aspect which should not be disturbed. Counsel further submitted that the evidence on record did not support the offence of assault.

With regard to the 2nd appellant, counsel submitted that the complainant picked him out in a properly conducted police identification parade. That the street name "*Beka*" was mentioned by the 1st appellant. It was in the circumstances therefore necessary to conduct the identification parade. The successful identification parade then placed the 2nd appellant at the scene of crime. To counsel, the entire evidence was subjected to thorough scrutiny by High Court contrary to the submissions by the 2nd appellant. On the defences advanced by the appellants, it was his view that they were duly considered and rightly rejected.

To our mind, this appeal turns on whether the appellants were positively identified by the complainant as the perpetrators of the crime. The other issues regarding whether ingredients of the offence of robbery with violence were met, re-evaluation of the evidence as well as whether or not their respective defences were given due consideration are merely peripheral. We shall nonetheless consider them.

On identification, this is how the trial court delivered itself on the issue:

> *"But the complainant said he saw them following and attacking him as there were lights on the way and at the scene. He also held onto the 1st accused until members of the public arrived and assisted him.*
>
> *PW2 and PW3 soon arrived at the scene and saw the accused who had just been arrested while the complainant was bleeding on his head. I do not believe what occurred was the kind of a struggle as described by the 1st accused as I find it inconceivable that the complainant could simply have jumped on a stranger in the manner alleged. I believe the complainant told the truth as confirmed by PW2 and PW3.*
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> *The complainant also said he saw the 2nd accused clearly at the time of the incident as there was enough electricity light. He subsequently identified him in the identification parade properly conducted by PW6. It appears he positively identified him as the other assailant who escaped. It is therefore not true the 2nd accused knows nothing about the incident.*
>
> *In the circumstances I am convinced beyond reasonable doubt both accused committed the offence as charged. Accordingly, I find them guilty and convict them".*

How about the High Court? It stated thus;

> *"PW1's testimony was congent and compelling. He described the manner in which the 1st and 2nd appellant trailed him before attacking him. He gave a detailed account of his struggle with both of them and how he held on the 1st appellant until members of the public assisted in arresting him. The account of PW1 is corroborated by PW2 and PW3. These two were woken up by noises on the morning of 17th November 2007 they went outside and found PW1 bleeding and the 1st appellant under the arrest of members of the public. The injury of PW1 was confirmed by the P3 form produced by PW7.*
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> *The evidence places the 1st appellant at the scene of crime. PW1 and the 1st appellant had physical contact from the time the 1st appellant attacked him upto the point members of the public intervened. The account given by appellant lacks credibility and the learned Magistrate, in our view, correctly rejected it……*
>
> *We now turn our focus to the 2nd appellant. In respect to him is evidence of a single eye witness. PW1 says that he did not know the 2nd appellant prior to the incident. PW1 says that both appellants trailed him for sometime and he was able to see them from the street lights and security lights from the surrounding building. He also says that he was able to see them as they tussled.*

"I struggled with them upto outside a video show room where there was powerful electricity lights and I also identified the one who escaped from his appearance."

This Court is satisfied that the 2nd appellant was positively identified. The light was from an electricity source and was in the words of the witness powerful. That is description of intensity."

These are concurrent findings of the two courts below on the issue of identification which we cannot interfere with unless it is demonstrated, and it has not, that those findings on the face of the evidence on record were plainly wrong. In other words and as a general rule, the second appellate Court will not ordinarily interfere with the concurrent findings and conclusions of the two courts below unless it is satisfied that they were based on no evidence or on a misapprehension of the evidence or that they are demonstrably shown to have acted on wrong principles in reaching those findings. We do not discern such misdirection in the circumstances of this case.

We are only too aware that where the only evidence against an accused is evidence of identification, a trial court as well as first appellate court are enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. Even if it is a case of recognition the two courts should bear in mind that recognition may be more reliable than identification of a stranger but still mistakes in recognition of close relatives and friends are sometimes made. See **Wamunga** case (Supra).

The two courts below appreciated that the offence was committed in the wee hours of 17th November, 2007. They appreciated that it was probably dark and hence the need to ascertain the availability of light that would have enabled the complainant to sufficiently see the appellants and in particular the 2nd appellant as to be able to identify him. Hence they interrogated the availability of the light at the scene and they were all persuaded that the light available at the scene was sufficient. Indeed, the complainant talked of powerful electricity light at the scene.

The identification of the 1st appellant to our mind presents no difficulty at all. He was arrested at the scene of crime. He concedes that much. Infact some of his personal property such as wallet, identity card and voters card were recovered at the scene and handed to PW5. His defence however is that he was a victim of circumstances. That as he was wondering home from a drinking spree, he decided to relieve himself in the middle of the road near the complainant's house. The complainant found him in the act and he was not amused. A quarrel ensued followed by physical combat. As he overwhelmed the complainant, he suddenly blurted "*thief, thief*" attracting the neighbours who rushed to the scene and had him arrested. Was this defence plausible? Both courts took the view that it was incredible and inconceivable. We agree. We do not see how a complainant would in those circumstances simply jump on a stranger in the manner the 1st appellant alleged. There is evidence that infact the appellants trailed the complainant for a while before they launched the attack. He had seen them with the aid of the street lights as well as security lights at the video shop. The P3 form is emphatic that the complainant suffered deep cut wound on the right side of the head and that probable type of weapon causing the injury was a sharp object. This ties in very well with the evidence of the complainant that he was cut with a panga as the robbery was underway. We cannot fathom how by merely pushing and pulling each other and finally falling on the ground, a deep cut on the head by a sharp object would result. It is instructive that the appellant never addressed this aspect of the matter in his cross-examination of the complainant. On the whole therefore we are satisfied that the conviction of the 1st appellant on account of his being arrested at the *locus in quo* cannot be faulted. The fear or the danger of relying on the evidence of a single identifying witness in the circumstances of the appellant is clearly misplaced.

According to the complainant, it is the 2nd appellant who on the instructions of the 1st appellant cut him with a panga. The circumstances of his identification are a little bit different, for he was arrested long after the incident and thereafter subjected to a police identification parade. It is obvious that the complaint's identification of the appellant was in difficult circumstances. The complainant was ambushed by two robbers whom he claimed to be the appellants. He wrestled with both of them. In the process he was cut on the head by this appellant and seriously injured. Nonetheless despite all this

harrowing experience he was able to identify the 2nd appellant courtesy of the powerful lights at the scene. Subsequently and through his own initiative he came to know the street name of the 2nd appellant as "*Beka*" short for Bakari. He gave a description of the 2nd appellant to the police. Again through his own initiative and investigations he was able to establish that infact this appellant resided in the same estate as himself according to PW5 and had since the incident relocated to his grandmother's house in Bamburi where he was eventually traced and arrested. PW5 also testified as to visiting the *locus in quo* whereupon he established that there were powerful electricity as well as security lights. The complainant was emphatic that they were engaged in the struggle for some time. They pulled and pushed until they landed at a video shop which had powerful security lights. Over and above this the appellant was not disguised in any manner as to make his identification difficult. The fact that he moved houses soon after the incident also gave him away. This is what resulted in him being arrested months later. On the day of his arrest, he was called out by his street name "*Beka*" and he duly responded. Coupled with the fact that the 2nd appellant subsequently participated voluntarily in a properly conducted police identification parade and he was picked out by the complainant, we cannot appreciate the appellant's complaint that his identification was faulty.

The two courts below also reached concurrent findings that the ingredients of the offence of robbery with violence were proved as those involved were two and that in the course of the robbery, the complainant was robbed of Kshs.300/-. He was also cut with a panga, a dangerous and offensive weapon. How then can it be said that the ingredients of the offence of robbery with violence were not proved?

The complaint by the 2nd appellant that the High Court did not subject the evidence tendered in the trial to fresh and exhaustive re-evaluation has no merit at all. Indeed the High Court acquitted itself in this regard very well and should be commended instead of being condemned. One only needs to look at the judgment to confirm that this accusation is clearly wanting and misplaced.

For all these reasons, we dismiss the appeal in its entirety.

Dated and delivered at Malindi this 11th day of December, 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