IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 219 OF 2010

BETWEEN

CHARLES KUCHACHA CHAI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Ibrahim & Ojwang, JJ.) dated 6th July, 2010

in

H.C.Cr.A. No. 336 of 2006)

****

JUDGMENT OF THE COURT

The appellant, ***Charles Kuchacha Chai*** was charged with two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars in ***Count I*** were that:

> ***On the 23rd day of December 2004 along Kaloleni-Mazeras road at Masai Mara Village, Kambe Location in Kilifi District within the Coast Province, jointly with others not before court being armed with dangerous or offensive weapons namely knives robbed Samson Mulwa Kitaka of his driving licence, P.S.V. Licence, drivers badge, wrist watch, jack and cash Kshs.3,636/= all valued at Kshs.9,536/= and immediately before or immediately after such robbery used actual violence to the said Samson Mulwa Kataka.***

In ***Count II*** the particulars were that:

> ***On the 23rd day of December, 2004 along Kaloleni-Mazeras road at Masai Mara Village, Kambe Location in Kilifi District within the Coast Province, jointly with others not before court, being armed with dangerous or offensive weapons namely knives robbed Vincent Kimanthi Mwavu of his P.S.V. Licence, conductors badge, ID Card and cash Kshs.500/- all valued at Kshs.3,900/=.***

The trial proceeded before ***T. M. Mwangi,*** the then Senior Resident Magistrate, Mombasa who on

29th November, 2006 found the appellant guilty on both counts and sentenced him to death in Count I and ordered the sentence in Count II to be held in abeyance. The appellant was aggrieved by the decision of the trial court and he filed an appeal to the superior court. On 6th July, 2010, ***M. K. Ibrahim*** & ***J. B. Ojwang, JJ*** (*as they then were*) dismissed the appellant's appeal. Undeterred,the appellant filed this second appeal.

During the hearing of the appeal before us on 23rd October, 2013, ***Mr. Ngumbao,*** the learned counsel for the appellant, and with leave of the court, filed supplementary grounds of appeal in addition to the appellant's home grown grounds of appeal.

The learned counsel for the appellant faulted the findings of the superior court in failing to re-analyze and re-evaluate the evidence as according to him, the identification was not free from the possibility of error. He attacked the evidence of PW2 who said that he had known the appellant before yet he did not make this assertion before and further it was not clear who identified the appellant at the time of his arrest. He invited us to find that the appellant's defence was not considered.

Mr. Oyiembo, the learned Assistant Director of Public Prosecutions opposed the appeal. He was of the view that the conviction was safe as the appellant was identified by three (3) witnesses who saw him using the lights from the matatu as well as moonlight. Contrary to the assertion by the appellant's counsel Mr. Oyiembo maintained that the appellant's defence was considered. He urged us to reject the invitation to re-analyse and re-evaluate the evidence as according to him the conviction was well grounded.

As pointed out the appeal before us is a second appeal. By dint of ***section 361*** of the Criminal Procedure Code our position as the second appellate's court is clear. Section 361 of the Criminal Procedure Code 75 provides *inter alia* that:

> ***"A party to an appeal from a subordinate court may subject to subsection (8) , appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of 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 position was enunciated in the case of ***Hamisi Mbela Dennis & Another v R Criminal Appeal No. 319 of 2009*** at Mombasa (UR) when this Court held:-

> ***"8. This being a second appeal, this court was 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 a right of appeal is confined to a question of law, an appellate court has loyalty to accept the 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)."*

This position was further reiterated by this Court in Nakuru ***John Sadera v R, Criminal Appeal No. 242 of 2008 (UR)*** where it was held *inter alia* that only issues of law may be raised and considered on a second appeal.

That being the position, the exception is however, provided if it is demonstrated to us that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision on such matters that the court was plainly wrong (see ***Josphat Karanja Muna vs R Criminal Appeal No. 298 of 2006 (UR)*** If that be the case our

consideration of such matters will amount to considering matters of law as, it would then be accepted that the first appellate court failed to revisit the evidence that was before it afresh, analyze it and re-evaluate it as required by law.

In the subordinate court, the prosecution called a total of three (3) witnesses. PW1 ***Samson Mulwa Kitaka*** a matatu driver was relieved of his driving duties at about 9 p.m. on the 23rd December, 2004 by his conductor (PW2). He himself took charge of the conductor's tasks and upon demanding fare from one of the three persons who had boarded the matatu at Kaloleni stage, he was given a total of Kshs.36/= as opposed to Kshs.360/= for all the three passengers. When they got to Masai Mara stage, one of the three passengers aforesaid got hold of him and strangled him by the neck and the second passenger threatened him with a knife. The third passenger had sat with the driver in the front cabin. They were robbed of several items including money. Thereafter the trio fled into the bushes. He told the court that he was able to identify the robbers as there was moonlight. He described the manner of their dressing and this enabled his friend, ***Bassat Maguro Malindi*** (PW3) to lead them to the house of one of the robbers who was then arrested. This was on 13th January, 2005. In cross-examination PW1 said he was able to identify the robbers as besides the moonlight, there was light inside the matatu.

PW2 ***Vincent Kimathi Mwavu*** was with PW1. He is the one who swapped places with PW1 as he took over driving duties in place of PW1. He too maintained that he identified the appellant using light from the moon and the light from the matatu. He said he had known the appellant before as the appellant was a tout.

PW3 ***Bassat Maguro Malindi*** was driving motor vehicle KAQ 059T in the opposite direction from PW1's motor vehicle on the night of 23rd December, 2004. At about 9 p.m. he saw the vehicle being driven by PW1 using his vehicle's full light and he was able to identify the three robbers. He is the one who led PW1, PW2 and the police to the appellant's home on the day of the arrest. He told the court that before the arrest the appellant hid himself in the ceiling.

In his unsworn statement of defence, the appellant denied the offence. He explained his initial refusal to open his door on the day of his arrest until the police officers identified themselves.

After hearing the evidence, the trial court found the appellant guilty on both counts. On appeal the Judges of the superior court upheld the conviction and sentence.

On our part, we find that PW1 and PW2 were attacked at about 9 p.m. Both of them said they identified the attackers using moonlight and the inner light of their motor vehicle. Be that as it may, the record does not show how bright the moonlight was on this particular night. We also do not know how bright the inner light of the matatu was. PW3 too told the court that he identified the three persons at the *locus in quo* before they disappeared into the bushes. He said he used his headlights. Given that PW3 was driving in the opposite direction from that of PW1 and assuming the assailants were not in the middle of the road but by the side of the road, did PW3's motor vehicle lights fully illuminate the trio so as to enable him to identify/recognize them? We do not think so.

PW3 led the police, PW1 and PW2 to the appellant's home, as PW3 testified that he had seen the appellant at *locus in quo* using his vehicle's lights. In our view this assertion was not free from possibility of error. It is very possible that PW3 may have been mistaken in thinking he saw the appellant at locus in quo. PW3's further assertion that the description of the clothes as narrated by PW1 and PW2 made him conclude that it was the appellant, does not provide water tight evidence as regards the identity of the appellant. We find that the High court failed to evaluate the evidence sufficiently. Had it done so, it would have appreciated that the circumstances of identification of the appellant were not favourable and further that the quality of the evidence of recognition was poor.

It is in view of the above that we find that the charges against the appellant were not proved to the required standard. Accordingly we allow the appeal, quash the conviction and set aside the sentence imposed. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 24th day of January, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR