IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 684 OF 2010

BETWEEN

COLLINS AKOYO OKWEMBA & TWO OTHERS …….....……..APPELLANT

AND

REPUBLIC ……..……..……..……RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (Msagha & Ochieng JJ.) dated 22nd November, 2011

in

H.C.CR.A NO. 529,533 & 534/06

****

JUDGMENT OF THE COURT

The three appellants herein had their first appeals to the High Court dismissed by Mbogholi Msagha and F.A. Ochieng, JJ, in a judgment delivered on 22nd November 2011. The said appeals had been against their conviction on some eight counts of robbery with violence contrary to **S296(2)** of **Penal Code** and the sentences of death imposed thereafor by the Nairobi Chief Magistrate's court (T. Okelo, SRM) on 19.6.06.

The appellants filed some separate but identical grounds of appeal in person dated 29th November 2011 by which they raised the following grievances;

a. That the learned High Court Judges failed to analyze and reevaluate the evidence afresh thereby occasioning a failure of justice.
b. That the learned Judges of the High Court failed to observe that various provisions of law had been violated in respect of the appellants trial namely; Section [Article] 50 (2) (b) and 159(2) of the 2010 Constitution and Sections 14(3), 137(c), 329 and 169 of the Criminal Procedure Code.

The appellants originally assigned counsel, Mr. K. A. Nyachoti, Advocate, subsequently filed a supplementary memorandum of appeal dated 23rd July 2013 by which he raised additional grounds of appeal on behalf of all the appellants, complaining that the learned Judges of the High Court fell into error by;

a. Failing to find the judgment of the trial court to have been a nullity for 'failure to pronounce judgment' in counts 11 and 12 thus rendering the whole proceedings a nullity.
b. Upholding the convictions of the appellants based on inconclusive evidence of identification under unfavourable conditions
c. Failing to draw adverse inference against the prosecution for failure to summon essential witnesses
d. Upholding the appellants convictions without considering their alibi defences.

At the hearing of the appeals, learned counsel Mr. Wandugi and Mr. Nyachoti appeared for the first and third appellants, respectively, and based their arguments on the said supplementary memorandum of appeal while **Ms. Rashid**, learned counsel for the 2nd appellant, based her submissions on that appellant's self-prepared grounds.

Going first, **Ms. Rashid** assailed the judgment of the High Court for failing to evince that court's bounden duty, as a first appellate court, to conduct a fresh and exhaustive evaluation of all the evidence and arrive at its own conclusion as to the guilt or otherwise of the 2nd appellant. Counsel made reference to decisions of this Court where that duly has been adumbrated including **GABRIEL KAMAU NJOROGE Vs. R** [1982-88] where it was stated at p1136 as follows:

> ***"As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v. R. (1957) EA 336, Ruwala vs. R. (1957) 570. If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirection and non-direction on material points are matters of law."***

It was counsel's contention that had the learned Judges discharged their duty properly, they would have noted a glaring irregularity that, according to counsel, vitiated the trial, namely, that the trial court had proceeded on the basis of the original charge sheet that had **ten** counts yet this had been discarded when the prosecution introduced amendments. A new charge sheet was introduced on 30.11.04 that had **twelve** counts and so the reliance on the former charge sheet rendered the trial a mistrial and a nullity. Counsel urged us to so find but beseeched us not to order a re-trial, as such a course will not serve the ends of justice seeing that the appellants have been in custody for nearly a decade and the witnesses may not be readily available.

On his part, **Mr. Wandugi** supported his learned colleague's arguments urging that in so far as the trial court and the High Court based their decisions on a non-existent charge sheet, they had misdirected themselves. He conceded that the appellants were represented at the trial by able counsel but submitted that it was the trial court's primary duty to ensure regularity of the proceedings before it. Counsel also took issue with the reliance by the two courts below on identification evidence which, it was submitted, was flawed in that nobody purported to identify his client. He also made the novel submission that the evidence of the identification parade ought to have been disregarded as none of the identifying witnesses identified the parade forms that were later produced by the respective parade officers. He did concede, however, that there was no requirement or provision on the forms themselves that they be signed by the identifying witnesses. Counsel nevertheless faulted the identification parade evidence on the further basis that it was unreliable not having been preceded by a prior report mentioning his client. Counsel was of the view that the first appellate court did not approach the identification evidence with the requisite degree of circumspection. He rested his submissions by stating that the prosecution evidence was fraught with serious contradictions surrounding the registration number of the bus on which the robbery is said to have occurred in that whereas the charge sheet described it as KAQ 558W, a number of witnesses referred to it variously as KAQ 558W; KAV 558W and KAW 558.

Mr. Nyachoti echoed the submissions by Ms. Rashid on the question of the amended charge sheet. He went further to urge that in so far as the judgment of the trial court did not pronounce on counts 11 and 12 of the charge sheet as amended, the same contravened **Section 168** of the **Criminal Procedure Code** and was therefore an "illegal judgment." We sought to know whether counsel had any judicial pronouncement as authority for that proposition but he said he had none.

Regarding the identification evidence against the 3rd appellant, Mr. Nyachoti's submission was that it was in-conclusive and ought not to have been relied on by the two courts below. Counsel submitted that the identification parade evidence against the 3rd appellant was unfair in that he stood out and was unique among the parade members for brown or coloured teeth and a scar which made it easy for him to be picked by identifying witnesses. It was counsel's bold contention that the parade officer ought to have collected and paraded persons with such teeth and scars for that evidence to be fair. Mr. Nyachoti's further argument was that the courts below ought to have drawn an adverse inference from the prosecutions failure to call as a witness the conductor of the bus from whom a jacket and a ticketing machine were taken during the robbery. He concluded by stating that the 3rd appellant's defence, which was in the nature of an alibi, was not displaced by the prosecution.

Responding to the submissions on behalf of the appellants, **Ms. Nyamosi** for the Republic considered herself constrained to concede the appeals on the basis that the convictions of the appellants were based on "a non-existent charge sheet." She therefore took the view that the proceedings were a nullity and urged us to so find but order a re-trial. In a brief reference to the merits of the appeal, the learned A.D.P.P. submitted that the evidence before the trial court, which was re-evaluated by the High Court, was that of identification and recent possession and would have been sufficient to found the convictions of the appellants but for irregularity respecting the charge sheet.

Counsel for the appellant are correct in asserting the legal position regarding the duty a first appellate court. It is a duty to re-evaluate, re-analyze and reconsider the whole evidence in a fresh and exhaustive way before arriving at it own independent decision as stated in a long line of authorities including the more notorious ones of **OKENO Vs. REPUBLIC,** (supra) [1972]E.A 32 and **GABRIEL KAMAU NJOROGE Vs. REPUBLIC,** which was cited before us. That duty belongs by law to the first appellate court and this Court, on second appeal, is invested with jurisdiction over matters of law only, and does not delve into any detailed analysis of evidence. This distinction has been previously expressed as follows in **KARANJA & ANOR Vs. REPUBLIC** [2004]2 KLR 140 at 146:

> ***"We have perused the evidence before us. As this is a second appeal, we cannot analyze afresh the evidence adduced at the trial court. Ours is to see if the same was properly analyzed by the trial court and if it was subjected to fresh analysis by the first [appellate] court …. Once we are satisfied that the two courts did analyze the same evidence properly then we would find it difficult to interfere with their decision particularly if the same is a concurrent decision."***

In deciding whether the first appellate court discharged its duty, we do not look for any magic words. There is no hard and fast rule and no prescriptive formula. All we need to be satisfied about is that a thorough and exhaustive analysis has been applied to the evidence as a whole.

Looking at the impugned judgment of the High Court, we are unable to agree that the learned Judges did not exhaustively and freshly consider the evidence. We are satisfied that the learned Judges did properly identify the proper issues on which their determination ought to have rested and they tested the evidence properly before arriving at their judgment. This complaint is therefore unmerited.

As regards the conviction of the appellants on a non-existent charge sheet as contended, or the related one that the judgment was 'illegal', (by which we take counsel to have meant 'irregular') for not pronouncing on counts 11 and 12, we are not persuaded that the proceedings herein were a nullity. It is clear from the record that even though there was an amendment to the charge sheet by which some two additional counts were introduced, both courts below did not make any findings on those new counts but did so on the original unaltered counts.

The appellants had on 2.9.04 pleaded 'Not guilty' to some ten counts of robbery with violence and to some two alternative counts. On 30.11.04 the prosecutor addressed the court which then recorded the proceedings as follows:

> ***"Prosecutor: I wish to make an application to amend the charge sheet to change the figures from 1,115,500/= to 3,135,500/= and also to add counts 11 and 12.***
>
> ***Court: the charges to be read over to the accused ---[who all state not guilty to all 12 counts]***
>
> ***Court: Plea of not guilty entered in all counts and alternative counts."***

We are satisfied that as far as the procedure for amendment or alteration of charges is concerned, there was substantial compliance with the provision of **Section 214** of the **Criminal Procedure Code**.

After the trial the appellants were convicted on eight of the original ten counts which were unaffected by the amendments effected on 30.11.04. Had the convictions of the appellants been on counts that were not before the court, the arguments might perhaps have had substance but in the case before us, the two courts' failure to refer to counts 11 and 12 introduced on 30.11.04 were an advantage and not a burden to the appellants. We therefore consider what transpired before the trial courts to have been an unfortunate slip curable by **Section 382** of the **Criminal Procedure Code** which provides thus:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determinating whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to question whether the objection could and should have been raised at an earlier stage in the proceedings."***

We respectfully reject both the appellants' argument and the respondent's concession, (which is not binding on us) that the irregularity vitiated or rendered the judgment and the proceedings a nullity. It did not.

Turning now to the question of identification that was urged on behalf of the appellants, we are fully cognizant of the sensitivity and careful consideration that must attend a court's analysis of identification evidence, whether single or multiple, as a basis for convicting an accused person. This is due to the ever-present risk of mistaken identity as recognized by this Court in many cases including **KAMAU Vs. REPUBLIC** [1975] EA 139, which stated that even the most honest of witnesses can be mistaken when it comes to identification. This was further expounded in **WAMUNGA Vs. REPUBLIC** [1989] KLR 424 at P430 as follows;

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined to 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 in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R. vs. Turnbull (1976) 3 ALL ER 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 whom he knows, the jury***

should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Having carefully perused the record of the evidence and the judgments of both courts below, we have no doubt that the evidence was approached with the requisite circumspection. We are on our part satisfied that the learned Judges properly directed themselves when they restated the evidence as follows before concluding that there was no error in the identification of the appellants;

> ***"The alleged robbers boarded the bus sometime at about 10 a.m and remained in the bus for quite some time. We say so because, the bus was commandeered from Jogoo Road to the City Stadium roundabout, took a turn towards Eastleigh and ended up behind Garissa Lodge. The said robbers communicated first with the driver PW1 in ordering him to surrender the bus. Secondly, with passengers in demanding the various items that were robbed from them. There is no allegation that the robbers wore any masks or that the vision of the witnesses was compromised in any way. The robbers who took possession of the items from the passengers moved about in the bus. The surrender and removal of these items, which are of personal nature, entails close proximity that is a mobile telephone has to be handed over using the hands and rings have to be removed from the fingers."***

The visual identification of the appellants at the scene was confirmed by the fact that at various identification parades, a number of witnesses picked the appellants out.

We find no merit in the complaints that the identifying witnesses neither signed the parade forms nor identified them in court. There is no requirement at all that an identifying witness do sign the identification parade forms. These are to be signed by the officer mounting the parade and by the suspect who is the subject of the parade. And precisely because the witness is not the author or maker of the parade form, there is no requirement, and indeed it would be a strange thing to require it, that such witness should identify the parade form in court. It is the parade officer who identifies and produces the same having authored them as a report of the parade.

Regarding the manner in which the parades themselves were conducted, we have not been given cause to interfere with the concurrent findings of the two courts below that the same were fair and faultless occasioning the appellants no injustice.

Since we agree with the two courts below that the appellants were properly identified as the robbers at the scene, it follows that the 3rd appellant's alibi defence that he was not there is fully and properly dislodged.

Other than the evidence of identification, which we find to have been iron-clad, there is the additional evidence that the 1st appellant, who had been identified by all the victims of the robbery as the robber who took charge of and drove the commandeered bus for nearly an hour, led police officers to two of his accomplices who turned out to be the 2nd and 3rd appellants. The evidence of the leading and the recovery of the items that were stolen during the robbery was incontestible. It corroborated the evidence of identification and brought into play the doctrine of recent possession which was properly applied as a further basis for the appellants' conviction. It was summarized by the trial magistrate as follows:

> ***"PW 21 Sgt Bosco Kisae was the investigating officer in this case. He collected accused 1, a prisoner then, and the metro shuttle whose photos were produced as Pexh. 3 and the other exhibits 1 and 2. Accused 1 then gave them the houses of accused 2 and 3 and offered to take PW4 and his team to Kwamichael which he did. PW 12 and his team were able to arrest accused 2 and accused 3 and recovered Pexh. 14 and two rings written Ndinda and Ndunda respectively on each and both dated 25.8.01 which rings were later identified by PW 4 and PW 7 who were a couple as theirs. They also recovered earrings, Pexh. 5 which were identified by PW 5 as hers, and they also recovered Pexh. 15 as copy of accused 2's ID card, also recovered was a 50/- note Dollar and a wallet…."***

Turning to the complaint that the learned Judges ought to have drawn adverse inference from the failure to call the conductor of the stricken bus, we are not persuaded that any error was committed. Nor was there any basis of making of the negative inference. The prosecution is under no obligation to call any number of witnesses so long as they bring before the court evidence sufficient to prove their case to the required standard. The evidence tendered herein was not barely adequate to invite the inference. (see **BUKENYA & OTHERS Vs. UGANDA** [1972] EA. 594). As we have stated before, it was quite overwhelming.

It is enough for us to reiterate what this Court stated in **MWANGI Vs. REPUBLIC** [1984] KLR 595:

> ***"Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and the court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive."***

It was not alleged that such obliquity impelled the non-calling of the bus conductor.

Given all that we have found, the appeals by all the three appellants are devoid of merit and they are accordingly dismissed.

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

D. K. MUSINGA

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COURT OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mwn