IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 18 OF 2013

MOHAMED IMMAN ALIAS

BETWEEN

HAJI HAPENDEKI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the high Court Mombasa (Ojwang J/Odero J) dated 7th

July, 2011

In

HCCRA No. 315 OF 2008)

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JUDGMENT OF THE COURT

[1] **Mohamed Immam alias Haji Hapendeki** is the appellant before us. His appeal is a second appeal originating from the judgment of the Senior Resident Magistrate's Court at Mombasa. The appellant's first appeal filed at the High Court in Mombasa was heard and dismissed by ***Ojwang J***(as he then was) and ***Odero J***.

[2] The circumstances leading to the appellant's arrest were that on the 12th October, 2006 at about 8.30pm Bashir Hussein Ali (Complainant) who lives in Mwandoni was heading home from a mosque, when he was attacked and robbed of two mobile phones and Kshs. 11,000I- by a group of about 6-8 men. The men who were armed with pangas and rungus cut the complainant on the head and seriously injured him causing him to lose consciousness. The complainant was taken to Jocham Hospital where he was admitted. In the meantime the robbery was reported at Nyali Police Station, and on the same night one of the assailants was arrested and subsequently tried for the offence. On the 18th September 2007, the complainant made a statement to ***Police Constable Fairfax Masinde (PW3***) and named one of the people who had robbed him as ***Haji Hapendeki***, who was then in custody. The appellant who was the person identified as Haji Hapendeki was charged and tried before the Senior Resident Magistrate's Court with violently robbing the complainant contrary to

section 296(2) of the Penal Code.

[3] In his defence, the appellant denied having committed the offence maintaining that on the date the alleged offence was committed that is 12th October 2006, he was in prison having been charged on 22nd August 2006, convicted and sentenced to two months imprisonment for a drug related offence. He completed the sentence but was not released from custody because he was having a second case in respect of which he was tried and subsequently sentenced on 16th May, 2007 to a term of imprisonment for five months. The appellant claimed he was released on 1st June, 2007 on Presidential Amnesty.

[4] In her judgment, the trial. magistrate found that the appellant was recognized during the robbery by the complainant who knew him before; that the locus in quo was well lit with electricity light and that the complainant identified the appellant by name to the police. The trial judge rejected the appellant's defence maintaining that the person who was allegedly in custody and imprisoned was one Mohamed Ali Salim who was a different person from Mohamed Immam alias Haji Hapendeki who is the appellant.

[5] In dismissing the appellant's first appeal the High Court rendered itself as follows:

> *" ...We have considered each of the ground of the appeal relied upon by the appellant as well as his written submissions; and we come to the conclusion that the vital question to dispose off this matter is the inference that must be drawn from the evidence. We have considered all the evidence adduced by the prosecution and considered whether this evidence irresistibly point to guilt, and whether the integrity of this evidence is placed in doubt by the case made by the appellant...*
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> *It is not doubted that the complainant was familiar with most of his attackers and that the locus in quo was well lit and he was able to observe those who attacked him. Although there was a time-lapse between the robbery attack and the arrest of the suspect, there is nothing on the record to detract from the inference that none but the suspect had been apprehended. The appellant, by contrast, has shown lack of candour by his assertion that he was away in jail at the time of the material incident; nothing shows that he was in jail at the time. The appellant has also invoked conflicting names, to deny that he was properly identified as a suspect: but the Court cannot sustain this ruse. The evidence of all the prosecution witnesses taken together, lays the guilt at the door of none but the appellant herein, and he has not succeeded in raising any doubts on the validity of a conclusion that there is guilt.*
>
> *We dismiss this appeal, uphold the conviction, and affirm sentence as imposed by the trial Court"*

[6] Being dissatisfied with the judgment of the High Court, the appellant has raised eight (8) grounds in a memorandum of appeal to this Court which he prepared in person. During the hearing of the appeal ***Mr. Ngure*** appeared for the appellant and argued the appeal based grounds No.6 and 8 of the appellant's memorandum of appeal. These grounds may be summarized as follows:

> - That the Court erred in failing to consider the circumstances of the appellant's arrest and the connection if any with the robbery,
>
> - That the Court erred in failing to consider the appellant's defence

[7] Mr. Ngure submitted that the appellant had a good alibi having been in custody at the time the offence was allegedly committed; and that the appellant having raised an alibi, it was for the Court to call evidence to disprove the alibi. Counsel argued that the only logical explanation for the appellant being apprehended more than one year after the robbery was that the appellant was in prison. Counsel further pointed out that the circumstances of the appellant's arrest were also not clear.

[8] ***Mr. Tanui***, senior prosecuting counsel opposed the appeal and supported the conviction. He submitted that there was no defence of alibi established by the appellant, as the person who was allegedly in prison was a different person from the appellant. He conceded that the circumstances of the appellant's arrest were not clear but maintained that the complainant was sure that the appellant was one of the persons who attacked him. He therefore urged the Court to uphold the conviction.

[9] This being a second appeal, our mandate is under section 361(1) of the Criminal Procedure Code limited to considering issues of law only. Secondly, we are bound to accept the concurrent findings of facts made by the two lower Courts and should only interfere with the decision of the trial or first appellate Court if it is apparent on the evidence that no reasonable tribunal could have reached that conclusion or if the Court misdirected itself. (see **M'Riungu vs. Republic [1983] KLR 455)**

[10] In this case, the concurrent findings of the two lower Courts were, that a gang of six to eight persons robbed the complainant; that a report was made to the police; and that the appellant who was recognized by the complainant during the robbery, was arrested about a year after the incident. Both courts rejected the appellant's alibi defence that he was in custody at the time of the alleged offence.

[11] In our view there are two issues of law that requires determination in this appeal. These are whether the appellant was positively identified as one of the people who robbed the complainant, and whether his alibi defence was properly considered both by the trial Court and the first appellate Court.

[12] The only evidence that implicated the appellant in the commission of the offence was that of recognition by the complainant. As was held in **Kiarie vs Republic [1984] KLR 739** where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be water tight to justify a conviction. Thus it is necessary to consider the evidence and the circumstances under which the appellant is alleged to have been identified.

[13] From the complainant's evidence, the incident occurred at 8.30pm and though there was electricity light in the area, his assailants emerged from an alley and attacked him suddenly. The complainant was not sure of the number of people who attacked him but put the number at 6-8 people. The complainant was cut with a panga immediately upon being attacked. Clearly, the complainant was taken by surprise and the circumstances were very stressful. The evidence does not support the conclusion of the High Court that complainant was able to observe those who attacked him. Indeed, the complainant became unconscious after the attack and only regained consciousness the next day. The following statement made **by Lord Widgery C.J.** in **R v Turnbull [1976) All E. R 549** that was cited in **Wamunga v Republic [1989] KLR 424** is instructive:

> ***"...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 ..."***

It is evident that neither the trial magistrate nor the learned judges of the first appellate Court exercised the required caution in considering the complainants evidence. Had they done so they would have found that under the circumstances in which the complainant purported to have identified the appellant, it was doubtful whether the complainant could see and recognize all his attackers as he claimed, and thus the possibility of a mistaken (albeit honest) identification could not be ruled out.

[14] It does not help that the evidence regarding the naming of the culprits that would have provided consistency in the complainant's evidence of recognition was rather wanting. The complainant claimed to have given the names to the police. However, he also testified that

he fell unconscious after the attack and that when the police went to see him at the hospital that night, he could not speak. The question is who gave the names to the police that led to the arrest of the suspect who was arrested on the night of the robbery? Indeed, according to the evidence of ***PC Crispus Karani*** the complainant only recorded his statement to the police about a week after being discharged from hospital. This is when he allegedly gave one of the names of his assailants as Haji Hapendeki. It would appear that someone other than the complainant gave some names to the police leading to the arrest of the first suspect.

[15] ***FairFax Masinde (Masinde) (PW3)***, testified that the appellant gave a further statement on the 18th September, 2007, when he mentioned Haji Hapendeki. From the evidence of Masinde, the appellant was in custody by this time. The witness claimed that the complainant was the one who caused the appellant to be arrested through assistance from the public. The complainant's evidence did not support this assertion nor was any evidence adduced to explain the circumstances of the appellant's apprehension either by members of the public or by the police. Therefore the explanation given by the appellant that he was already in custody having been previously arrested in connection with an offence unrelated to the robbery was not disproved.

[16] Further, the appellant raised an alibi defence, and as was held in ***Kiarie vs. Republic*** (supra);

> ***"...An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a Court a doubt that is not unreasonable; Said vs. Republic [1963] EA6 ...")***

[17] The appellant maintained that at the time of the commission of the offence, he was in prison having been arrested in connection with a different charge. The High Court in considering this defence appears to have placed a burden on the appellant. The extract of the judgment referred to earlier shows that the High Court expected the appellant to prove that he was in jail and concluded that the appellant had not succeeded in raising any doubts. It is evident that the learned judges fell in error in shifting the burden of proving the alibi onto the appellant. Once the appellant had raised the alibi defence, the burden was upon the prosecution to disprove the alibi.

[18] The appellant did his best to establish his alibi by calling for records from the prisons. The judges relied on the disparity in the names to reject the appellant's alibi. This was not a sufficient basis for rejecting the alibi as it was for the prosecution to prove that the person who was in custody was actually a different person from the appellant. It matters not that the name was different from that of the appellant for the appellant may have used a different name. The identity of the person could have been easily established by the prosecution through calling evidence from prisons of the fingerprints of the person who was in custody backed with comparative evidence from a fingerprints expert. We find that both the trial magistrate and the first appellate Court judges misdirected themselves in considering the appellant's defence of alibi as a result of which the defence was wrongly rejected.

[19] For those reasons we find that the appellant's conviction was not safe. Accordingly we allow the appeal, quash the appellant's conviction and set aside the sentence imposed. The appellant's conviction and set free unless otherwise lawfully held.

Dated at and delivered at Mombasa this 13th day of March 2014

H. M.OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR