IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 15 OF 2013

BETWEEN

1. OMAR RASHID NZAI

2. ALEXANDER ODHIAMBO OLOO ….....APPELLANTS

AND

REPUBLIC ….....RESPONDENT

(Appeal from the judgment of High Court of Kenya at Mombasa (Odero & Nzioka, JJ.) dated 27th March, 2013

in

H.C.Cr.A. Nos 284 & 285 of 2008)

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JUDGMENT OF THE COURT

The appellants, ***Omar Rashid Nzai*** and ***Alexander Odhiambo Oloo*** were jointly charged with the offence of robbery with violence contrary to ***section 292(2)*** of the Penal Code. The particulars of the charge were that:

> ***"On the 1st day of June, 2005 at Ganahola Village Mikindani Changamwe in Mombasa District within the Coast Province, jointly with another not before court while armed with a dangerous weapon namely knife robbed Beatrice Mungai Okoth of Motorolla mobile phone valued at Kshs.9,000/= and cash Kshs.600/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Beatrice Mungai Okoth."***

The case proceeded for hearing before ***T. Mwangi,*** the then Senior Resident Magistrate Mombasa who on 16th October, 2008 found the two appellants guilty of the charge and sentenced them to death as prescribed by law. The appellants were dissatisfied with the conviction and sentence and filed ***Criminal Appeal Nos. 284 & 285 of 2008*** at the High Court. On 27th March, 2012 ***Odero & Nzioka, JJ.*** Dismissed the consolidated appeals. Undeterred the appellants filed this second appeal.

When the appeal came up before us for hearing, ***Mr. Ngumbau*** the learned counsel for the appellants abandoned ground numbers 1 and 5 and combined the rest in one broad ground that the High Court failed to analyze and re-evaluate the evidence. He invited us to find that the circumstances did not favour positive identification. The learned counsel faulted the High Court for not taking due consideration of the fact that PW2 John Okonda recorded his statement after the arrest of the 1st appellant and that the 2nd appellant was arrested in connection with a different offence.

Mr. Tanui, learned Senior Public Prosecutions Counsel for the State supported the convictions and the sentences. He contended that PW1 ***Beatrice Mungai Okoth*** and PW2 ***John Okonda*** knew the appellants before the incident, and that indeed the 2nd appellant threatened PW2 with dire consequences as the latter tried to intercept him while he was fleeing from the *locus in quo*. According to PW2 the 2nd appellant pointed out that he knew PW2 too well, and hence the threat of dire consequences.

The appeal before us is a second appeal. Our position as regards a second appeal is clear. By dint of ***Section 361(1)(a)*** of the Criminal Procedure Code we are mandated to consider only matters of law. In ***Kados v R, Nyeri Cr. Appeal No. 149 of 2006 (UR)*** this Court delivered itself thus on the issue:

> ***"... This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."***

In ***David Njoroge Macharia v R [2011] e KLR*** it was stated that under ***Section 361*** of the Criminal Procedure Code:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (*** See also ***C****hemagong v Republic [1984] KLR 213* ***)."***

Be that as it may, Mr. Ngumbau for the appellant contended that the High Court had failed to re-evaluate and re-analyze the evidence. If this be the case, we agree that this would be a matter of law and not of fact.

We have anxiously considered the evidence in this case. It is apparent that on 1st June, 2005 at about 8.45 p.m. PW1 ***Beatrice Mungai Okoth*** was walking home when she was attacked, initially by one man who was shortly joined by two others. She said she knew the 1st appellant very well although she did not know his name, as she used to see him in the estate. At the Police Station she described his complexion, height and appearance. On an undisclosed date she picked the 1st appellant from an identification parade. She testified that she had also seen the 2nd appellant in the estate, although she was more familiar with the 1st appellant.

PW2 John Okonda happened to be in the vicinity of the attack. He saw three men being chased and he tried to intercept them. It is then that the 2nd appellant whom he knew as ***Oloo Sonyaa*** threatened to shoot PW2 as the 2nd appellant said he knew PW2 too well. He also said he knew the one who was fleeing and carrying a big hand bag as Rashid Nzai, the 1st appellant**.**

From the evidence, it is clear that the 1st appellant was arrested on 3rd June, 2005 by PW5 ***Pc. George Daba*** after a tip off. The complainant was not present at the time of the arrest. We wonder who pointed him out? What was the description of the complainant to the police as regards the appellant's *"height", "complexion"* and *"appearance"* that enabled the police to arrest the 1st appellant even in the absence of the complainant? It is also instructive to note that PW2 did not record a statement until 7th June, 2005 after the 1st appellant's arrest. It is also noteworthy to point out that even the identification

forms in respect of the 1st appellant were never produced. Who carried out the identification parade? Was the parade properly conducted?

As for the 2nd appellant, he was arrested on 23rd August, 2005 in respect of another offence. Having been arrested of a different offence, why was he charged with the present charge? PW1 never picked him from an identification parade as none was conducted on account of the fact that PW1 was out of Mombasa. Was he arrested and thereafter PW1 and PW2 called upon to "*confirm*" that he was one of the assailants?

It is in the view of the foregoing that we find that the High Court failed to properly re-analyze and re-evaluate the evidence.

We are of the considered view that the evidence against the appellants did not meet the threshold of proof beyond any reasonable doubt required in a criminal charge. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellants be released forthwith unless lawfully detained for another offence.

Dated and delivered at Mombasa on 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