IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 191 OF 2012

BETWEEN

JOHN NJERU IRERI …….APPELLANT

AND

REPUBLIC ……RESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero & Nzioka, JJ.) dated 22nd June, 2012* in**

H.C.CR.A. No. 502 OF 2010)

****

JUDGMENT OF THE COURT

The appellant, ***John Njeru Ireri*** together with ***Maina Mwanzi Gatonye, Kyalo Matingo*** were charged with two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the change in count I were:

"On the 26th day of November 2009 at Zain shop along Lebanon round about in Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapon namely AK 47 Rifle and two pistols, robbed SAID ABDALLAH ALI cash 15,000/=, 14 assorted Nokia mobile phones, 4 assorted Motorola mobile phones, 2 Sumsung mobile phones, one J-Max mobile phone, one Dorado mobile phone, one HGCR mobile phone, one MOBILE mobile phone, one multimedia mobile phone, one Eurocel N- series mobile phones, one Sony Ericson mobile phone, one SGH mobile phone, one Alcatel mobile phone, Beng Siemen mobile phone, 6 Sony DVD Players 2 Nikai, DVD Player, 2 LG DVD Players, 2 Digital Astrovox Receiver, 4 Ipod player, 4 PMP video games machine, one Alpex video camera, one Sony digital video camera, 2 Casio wrist watch, 2 Seiko wrist watch, 6 memory cards, 8 flash disks, assorted Safaricom and Zain scratch cards, 14 assorted Nokia dummies all valued at Kshs.363,400/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SAID ABDALLAH ALI."

Whilst the particulars of the charge in count II were:

"On the 26th day of November 2009 at Zain Shop Lebanon round about in Mombasa District within Coast Province, being armed with a dangerous weapon namely one AK 47 Rifle and two pistols

robbed ELISHA SADUMA WAGONGO Kshs.3,000/=, phones make Nokia 5200, Nokia 1200, Nokia 1110(i), Nokia 6020, Motorola V.3X and Motorola W230 all valued at Kshs.42,000, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ELISHA SADUMA WAGONGO."

The trial proceeded before ***R. Ondieki,*** the then Senior Resident Magistrate at Mombasa Law Courts and in a judgment delivered on 18th November, 2010 acquitted all the other three except the appellant who was found guilty in respect of both counts. He was however sentenced to death in count I and as the sentence in respect of Count II was held in abeyance. The appellant was dissatisfied with the conviction and sentence and filed an appeal in the High Court. On 22nd June, 2012 ***Odero & Nzioka, JJ*** dismissed the appellant's appeal, hence precipitating this appeal. In his grounds of appeal, the appellant listed the following:-

"1. That the two hon. Courts erred in law and fact in convicting me in reliance of charge sheet which was un-sufficiently drafted when given that:

i. ***Section 296(2) of the penal code is not entitle*** *(sic)* ***to act as a charge of robbery but a charge of robbery is defined under the provision of section 295 of the penal code that was contrary to section 295 of the penal code that was contrary to section 207 (1) of the C.P.C. and Rule 64 (2) of the appellate jurisdiction*** *(sic)***.**

1. That the two hon. Courts erred in law and fact in upholding my conviction in reliance of visual identification evidence of Pw2 AND Pw3 without proper finding that the same was flowed *(sic)* ***when given other fact that:-***

i. ***The two courts did not give any sufficient reasons or circumstances why it accepted the testimony of identification of the appellant by Pw2 and Pw3 while it rejected it over the co-accused and yet there were no special and varying circumstances.***

ii. ***The duration under observation was not brought within measurable margins to be safely depended by a court of law to sustain conviction in a case of this magnitude.***

iii. ***The purported description given by Pw2 and Pw3 were of doubtful integrity for even the person who received their initial report was un-reasonably left out of the prosecution case.***

2. That the two hon. Courts erred in law and fact in upholding my conviction without proper finding that the prosecution failed in its totality *(sic)* ***to shift the burden of prove from me the appellant when given other facts that:-***

i. ***No any delivery note was produced in court to prove their allegations of the stolen phones that was contrary to section 109 of the evidence Act.***

ii. ***The alleged stolen phones were not serialized for the court to differentiate the ones stolen and the ones not stolen. That was contrary to section 107 of the Evidence Act.***

iii. ***No any legal document to prove that scene was visited and legal search was conducted thus contravening section 118 of the CPC and chapter 84 section 19 of the Police Force Standing Orders.***

3. That the two hon. Courts erred in law and fact in connecting my arrest with the matter in question without proper finding that the same was not fair when given other facts that:-

i. ***The alleged informer who led to my arrest did not come to testify to tell the court how I related to this accusation yet the court has powers under section 150 of the CPC to call him.***

ii. ***I was arrested with nothing in criminative*** *(sic)* ***to link me with this matter."***

When the matter came before us for hearing, Mr. Kimani, learned counsel for the appellant urged two grounds and abandoned all the others. The two grounds relied on by the appellant was on identification and on recent possession. On identification, Mr. Kimani urged us to find that there was no positive identification as four of the robbers were masked and the fifth donned a hat and further that PW2 told the trial court during cross-examination (*and not during his examination in-chief*) that he identified the appellant as he looked like a Somali. The appellant's counsel further urged us to find that whereas PW2 said the appellant was armed with a pistol, PW3 told the trial court that the appellant was armed with an AK 47 rifle.

On the doctrine of recent possession, Mr. Kimani urged us to find that although the appellant was found in possession of the two dummy phones, these were not positively identified as they had no serial numbers. Besides, he argued that PW1 had supplied dummies to 71 shops.

Mr. Wohoro, learned Senior Assistant Director of Public Prosecutions opposed the appeal on the grounds that the robbery took place during daylight and that the appellant was not masked and that he looked like a Somali. He further argued that the appellant was found with the two dummy phones which PW1 identified as having been supplied by him. As to the issue of whether the appellant was armed with a pistol or an AK47, he did not think that anything turned on that as many people are not able to distinguish the two.

This being a second appeal, our mandate is as provided in ***section 361*** of the Criminal Procedure Code.

"361(1) 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 provision of the law was amplified in the case of ***Hamisi Mbela & Another v. Republic*** Mombasa Court of Appeal ***Criminal Appeal No. 319 of 2009 (UR)*** wherein this Court held:-

"8. This being a second appeal, this court is 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 questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat 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 the case of ***John Sadera v R. Nakuru Criminal Appeal No. 242 of 2008 (UR)*** where it was held *inter alia* that only issues of law may be raised and considered in a second appeal to this Court.

As stated above, severity of sentence is a matter of fact and ***section 361(1)(a)*** precludes us from entertaining a complaint based on severity of sentence. As to the failure of the trial and the first appellate courts to re-analyze and re-evaluate the evidence, we do not discern such misgivings on the part of the two courts below us.

In our view the issues raised by the appellant that he was not positively identified and that the two dummy phones were also not positively identified to the extent that it vitiated the doctrine of recent possession, are matters of law which were adequately addressed by the two courts below us. Even if this argument

was to be buttressed by submissions that both the trial court and the first appellate court failed to re-analyse and re-evaluate the evidence, we do not think that the appellant's arguments would sway us. This is because the evidence against the appellant was simple and straight forward.

PW1 a marketer with a Nokia company supplied dummy phones to 71 outlets including PW2's shop. She identified the two recovered from the appellant as part of the batch supplied by her.

PW2 ***Said Abdallah*** was in one of the outlets when on 26th November, 2009 at about noon five people entered the shop, four were masked whilst the appellant donned a hat. They robbed him of several items including dummy phones. At the time of the robbery the appellant who was armed with a pistol threatened to shoot him. In cross-examination, he maintained that he identified the appellant as he looked like a Somali. On the other hand PW3 ***Elisha Saduna***, a phone repairer was also a victim of robbery. His place of business is next to PW2's shop save that they have a grill separating the two shops. His evidence was that the appellant was unmasked and at the police station he stated that ***"… I saw five people including one who looked like a Somali."*** On his part and acting on information, PW4 ***Pc. Chirchir*** went to Migadini on 30th November, 2009 and found the appellant and a lady in a house. He recovered the two dummy phones which he retrieved from under the bed. PW5 ***Pc. Munyao*** also took part in arresting the appellant. On 2nd December, 2009 the appellant led them to where the 2nd, 3rd and 4th accused persons were and they arrested them as well.

The appellant refused to take part in the identification parade organized by PW5 ***IP. Obwocha*** on 10th December, 2009. The refusal by the appellant to take part in the identification parade may have been justified as PW6 ***Pc. Kariuki*** had pictures of various suspects of robbery, including the appellant's picture. Be that as it may, we find that PW2 positively identified the appellant as he looked like a Somali. This is the description he gave to the police. The same description of the appellant was made by PW3, another victim of the robbery. Besides, the appellant was found with the two dummy phones, items which are ordinarily not kept in homes but in shop displays.

For the foregoing reasons we find that the appeal has no merit and it is hereby dismissed.

Dated and delivered at Mombasa this 17th of October, 2014

H. M. OKWENGU

…….

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