REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), KIAGE & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 91 OF 2014

BETWEEN

JAMES NDIVA MUNGAI …….....APPELLANT

AND

REPUBLIC …….……...…..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Kimaru & Nyamweya, JJ.) dated 6th December, 2013

in

H. C. Cr. A. 541 of 2010)

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JUDGMENT OF THE COURT

(1) The appellant, ***James Ndiva Mungai***, was charged and convicted of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The brief particulars of that charge were that on the 12th September, 2009 at Ongata Rongai township, Kajiado North District in Rift Valley Province, the appellant, jointly with others not before the court, while armed with a dangerous weapon, namely a knife, robbed Peter Kamau Muya of Kshs.7,000/= in cash, a mobile phone and a wallet, all valued at Kshs.13,000/=, and immediately before or after the time of such robbery wounded the said Peter Kamau Muya.

(2) By way of background, we shall briefly set out the facts as they were led before the trial court. At around 9.00 pm on the 12th September, 2009, Peter Kamau Muya (Peter), the complainant, was on his way to the shop. About 50 meters from his gate, he met with three people. One of them showed him a knife and placed it on his back, while another took his Itel mobile phone and Kshs.7,000/= that he had on him. There was a light at the gate, and he was able to see that it was the appellant who had taken the money. Peter asked the appellant to return his money and phone, but the other assailants came, gagged him, and led him to a nearby forest. One of the attackers also stabbed him on the head. The appellant was able to escape, and he ran in the direction of the nearby *boda boda* stage, where he told the people he found there that he had been attacked.

(3) Peter then called his neighbour, Bernard Wakahiu Muireri (PW2) and told him that he had been accosted by thieves. Bernard noted that Peter was bleeding from the head, and he escorted him to the hospital.

(4) On the 22nd September, 2009, the complainant was examined by Dr. Z. Kamau, a doctor based at the Police surgery in Nairobi. The doctor found that Peter had a wound, which had been caused by a sharp object, on the right side of his forehead. On the 18th September, 2009, Peter went to the chief's camp at Ongata Rongai and told APC Kiplosh Kotkash (PW4) that the appellant had robbed him, and that he had seen the appellant at the stage. APC Kotkash went and arrested the appellant.

(5) In his defence, the appellant denied committing the offence. He admitted that he was a *matatu* tout plying the Ongata Rongai-Nairobi route, but stated that on the material day he was arrested while he was on duty. He stated that it was the police who informed him of the robbery, and denied having anything to do with it.

(6) That was the evidence that was presented before the trial court. After considering this evidence, the trial court found the appellant guilty as charged, convicted him, and sentenced him to suffer death as provided in law.

(7) The appellant was aggrieved with his conviction, and therefore he filed a first appeal before the High Court at Nairobi in which he challenged the recognition evidence relied on by the trial court. He further faulted the trial court for relying on inconsistent and contradictory evidence as a basis for conviction, as well as for dismissing his defence.

(8) The High Court (Kimaru & Nyamweya, JJ), being cognizant of its duty to reconsider and re-evaluate the evidence adduced before the trial court, was of the opinion that the appellant had been properly identified as one of the attackers. The court stated that:

> ***"… it is clear that although the robbery took place at night, the complainant was able to recognise the appellant, the evidence of the complainant in relation to the identification of the appellant was that of recognition..***
>
> ***..***
>
> ***"Having warned ourselves of the danger of convicting the appellant on the basis of the evidence of a single identifying witness, we are satisfied that … the complainant recognised the appellant and therefore his identification of the appellant can be said to be watertight and free of the possibility of mistaken identity."***

(9) In sum, the High Court found that the evidence presented to the trial court was enough to sustain the conviction of the appellant on the charge of robbery with violence. The conviction and sentence of the trial court was therefore upheld, and the appeal dismissed.

(10) In this second appeal, the learned counsel for the appellant, Mr K. A. Nyachoti, relied on the supplementary memorandum of appeal filed on the 22nd July, 2014 which sets out three grounds of appeal as follows:

> a) ***The judges of the superior court erred in law and fact by upholding the conviction of the appellant based on the identification of a single witness when the conditions prevailing for such an identification were not favourable for a positive identification;***
>
> b) ***The learned judges of the superior court erred in law and fact by failing to re-evaluate and reanalyse the evidence to the prejudice of the appellant;***
>
> c) ***The learned judges of the superior court erred in law and fact by upholding the conviction of the appellant based on insufficient and contradictory evidence.***

(11) Mr. Nyachoti argued that the conditions for the recognition of the appellant were unfavourable since the complainant admitted to having been 50 meters from the gate when he was attacked. Counsel further submitted that the threat of violence to the complainant was high, and therefore the conditions obtaining at the time of the attack made it impossible for him to properly identify his attackers. Counsel therefore submitted that in the circumstances the recognition was unsafe and thus the conviction ought to be set aside. We understand these submissions to mean that in the circumstances, the complainant could not make a positive identification of any of the attackers as the area was not well lit, and he was distressed and therefore not in the right frame of mind to correctly identify any of the attackers.

(12) Counsel also faulted the re-evaluation of the evidence by the High Court, and submitted that it was improper as it failed to note that the light relied upon to identify the appellant was 50 meters away, and further that it failed to appreciate that none of the stolen property was recovered from the appellant. In addition, counsel faulted the first appellate court for relying on the identification of the appellant by his name, since there are several people who are called 'Ndiva'.

(13) In opposition to the appeal, Mr. C. O. Orinda, the learned Assistant Deputy Prosecution Counsel, submitted that the reliance on the single identifying witness was proper, and that the evidence was clear and cogent, and showed that the attack took place and that the complainant was injured in the course of it. Counsel stated that there was no fault to be found in the evaluation of the evidence by the High Court, and that the conviction of the appellant was safe. For these reasons, Mr Orinda urged us to dismiss the appeal.

(14) In a second appeal, our jurisdiction is limited by ***section 361*** of the Criminal Procedure Code in that we can consider only matters of law. We also remind ourselves that we are bound by the concurrent findings of fact of the courts below us, unless we find those findings to be unsupported by the evidence. We echo the holding in ***Karingo v R [1982] KLR 219*** where this Court pronounced itself on these principles in the following terms:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."***

(15) The main issue of law that has been raised by the appellant regards his identification as the person who was responsible for the offence. It is apparent that the main evidence that links the appellant to the commission of the offence is the identification of the appellant by the complainant. The question therefore is whether or not the trial court was right in relying on that evidence in convicting the appellant.

(16) We agree that where a court relies on the evidence of identification or recognition, especially if such evidence is of a single witness, it must examine that evidence carefully in order to satisfy itself as to the correctness of the evidence. The words of this Court in ***Wamunga v Republic [1989] KLR 424*** at ***426***, are instructive in this regard:

> ***"… it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

(17) Moreover, in ***Francis Kariuki Njiru & 7 Others v Republic [2001] eKLR (Criminal Appeal No. 6 of 2001)*** this Court rendered itself as follows:

"… The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Among the factors the court is

required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

(18) In the appeal before us, the trial court found that the identification of the appellant by the complainant, was by way of recognition, and that it was free from error. The learned trial magistrate rendered herself on the matter in the following manner:

> ***"The complainant said he had been seeing accused at the stage every day for 3 years. There were security lights where the incident took place.***
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> ***I find it is not only a question of recognition of the accused but prior knowledge of accused also said in his defence that he worked at the stage as a conductor. There are many people who work at the stage and I do not find any reason why complainant could have picked on accused to frame him up." (sic)***

(19) The first appellate court upheld this finding by the trial court, stating that ***"it was clear that the complainant had recognised the appellant during the robbery"*** and that ***"indeed the complainant recognised the appellant and therefore his identification of the appellant can be said to be watertight and free from the possibility of mistaken identity***."

(20) The testimony of the complainant was that he knew the appellant well, having met him three years before. He further testified that the area was sufficiently light by the security lights which were at the gate, enabling him to clearly see the appellant during the course of the robbery, and that he even asked him to return the mobile phone as well as the money. Later he told Bernard (PW2) that one of the attackers was a man called Ndiva. As was noted by the two courts below, this was a case of recognition, and this is even safer than identification. See ***Anjononi and Others v The Republic [1976-1980] KLR 1566*** at 1568 where this Court observed that ***"the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."***

(21) For these reasons, it is our considered view that the circumstances for recognition were favourable, and that there was no chance of mistaken identity.

(22) The second and final issue of law that arises is whether or not the High Court failed in its duty to re-evaluate and reconsider the evidence so that it reached the incorrect conclusion. The failure of a first appellate court to perform this duty becomes an issue of law that this Court can adjudicate upon - see ***Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR (Criminal Appeal No 5 of 2008).***

(23) We have carefully considered the judgment of the first appellate court, and find nothing wrong in the approach the learned judges adopted in their re- evaluation of the evidence tendered before the trial court. That court undertook its duty as outlined in ***Joseph Njuguna Mwaura & 2 Others v Republic (supra)*** and considered all the evidence adduced in order to reach its own independent conclusion. It is apparent that the first appellate court considered the identification evidence led by the complainant and formed the opinion that the prosecution's evidence proved to the required standard that the appellant had committed the crime of robbery with violence. We find no fault with the re- evaluation of the evidence by the first appellate court, and agree that the evidence led was credible and clear that it was the appellant who committed the crime against the complainant.

(24) In the result, we find that this appeal is devoid of merit, and it is hereby dismissed.

Dated and delivered at Nairobi this 10th day of October, 2014.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR