IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MWERA, OUKO & MOHAMMED JJ.A)

CRIMINAL APPEAL NO. 96 OF 2011)

BETWEEN

NATOME EKAI …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court at Kitale (M. Koome & F. Azangalala JJ) dated 13th October, 2010

in

H.C.CR. C. No. 35, 37 and 38 of 2010)

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JUDGMENT OF THE COURT

This is the second appeal by **NATOME EKAI** (the appellant), against the judgment of the High Court at Eldoret dated ***13th October, 2010*** which upheld the conviction and sentence imposed by the Senior Resident Magistrate ***(Mr. T. Nzyoki)*** at Lodwar in Criminal Case No. 121 of 2009.

The appellant was jointly charged together with Napokol Kadeny, Shadrack Ekeno and James Esekon with two counts of robbery with violence contrary to **Section 269 (2)** of the Penal Code. Napokol Kadeny was acquitted by the trial magistrate while Shadrack Ekeno and James Esekon were acquitted by the High Court Judge's. In count 1, it was the prosecution's case that, on 2nd February 2009 at Kakuma Refugee Camp the appellant and his confederates jointly with others not before court while armed with dangerous weapons, namely AK 47 rifle robbed Ksh. 17,000/=, one handbag, one Nokia phone 1100 and one suitcase containing assorted clothing valued at Ksh. 87,300/= from Elizabeth Nyanthou Jema and immediately after the time of such robbery used personal violence to the said Elizabeth Nyanthou Jema (the 2nd complainant).

In count II it was alleged that on the same day at more or less the same time the four jointly with others not before court while armed as aforesaid robbed Ksh. 9,000/=, a nokia phone 1100 and a suit case containing assorted clothing all valued at Ksh. 27,000/= from Lith Chau and immediately after the time of such robbery used personal violence to the said Lith Chau.

The prosecution called a total of 8 witnesses and after hearing their evidence as well as the unsworn evidence of the suspects, the learned Senior Resident Magistrate in a judgment dated **19th March, 2010** acquitted **Napokol Kadeny** as explained earlier but found the remaining three suspects guilty of the two counts of robbery with violence. They were sentenced to suffer death in count I while the sentence in respect of count II was suspended.

Upon the three suspects appealing to the High Court, the Judges of that court, *(M. Koome & F. Azangalala JJ.)* in their judgment dated ***13th October, 2010*** acquitted **Shadrack Ekeno** and **James Esekon** but dismissed the appellants' appeal thereby confirming the death sentence imposed by the trial court.

The appellant being aggrieved by the said judgment filed this current appeal and through his advocate has filed supplementary memorandum of appeal upon which grounds the appeal was argued. Those grounds are:-

i. That the learned judges erred in law in not evaluating the whole evidence before the lower court, weigh all the evidence and draw its own inferences and conclusions as was incumbent upon them as the first appellate court, and that had they done so, they would have arrived at a different conclusion. A miscarriage of justice was thereby occasioned.

ii. That the learned judges erred in law in not finding that the circumstances of identification/recognition of the appellant was not conducive and or did not meet the required legal standards.

iii. That the two courts below erred by failing to consider or adequately consider the appellant's defence.

The appellant comes to this Court by way of a second appeal. That being so, only matters of law fall for consideration in terms of **Section *361*** of the ***Criminal Procedure Code (Cap. 75 Laws of Kenya)***. This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or a misapprehension of the evidence or unless the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision see ***Chemagong v. Republic [1984] KLR 611*** and ***Kiarie v. Republic [1964] KLR 739***. The test to be applied is whether there is any evidence on which the trial court found as it did – ***Reuben Karani s/o Karani v. Republic [1950] 17 EACA 146.*** In ***M'Riungu v. Republic [1983] KLR 455*** the court held that:-

> ***"Where a right of appeal is confined to questions of law, the 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 decisions 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 Limited (T/A MBS Fastenings – The Times of March 30, 1983)".***

We need to state at this stage that although both the High Court and the trial court made a concurrent finding that there was proof of the charge in count 1 against the appellant, on our own assessment of the evidence, we find that there was no basis for that finding. The complainant in count 1 was categorical that although the appellant was known to her as a *boda boda* operator prior to the date of the attack, she never saw him at the scene of the attack. The appellant ought on that evidence, to have been acquitted of the charge in count 1, as there was no other evidence connecting the appellant with the offence charged in count 1.

The learned trial magistrate correctly ordered that the sentence of death in respect of count II be suspended. What was the evidence against the appellant in count II? Once again both courts below found as a fact that the appellant was known to the second complainant before the date in question.

The sole broad question raised before the two courts below and indeed before us was whether the appellant was part of the gang of robbers that attacked the 2nd complainant on the fateful night. It is common ground that the offence took place on **2nd February, 2009** at about **2:00 am.** We also note as the two courts below also did, that this is a case of a single identifying witness. It is only the second complainant who is alleged to have seen the appellant. The source of light according to her, were torches that the appellant and his co-accused had.

It is a well settled principle of law that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. See **Roria -vs- Republic** (1967) EA 583 and **Republic -vs- Turnbull** (1976) ALL E.R 549.

In **Wamunga -vs- Republic (1989) KLR 424,** this Court held at page 426 as follows:-

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

In this appeal, the State has argued that the identification was proper as it was one of recognition since the 2nd complainant knew the appellant by appearance; that the appellant was a *boda boda* operator and had infact previously ferried her; that the appellant spent considerable time with the 2nd complainant and that he was in close proximity with PW2 when removing the beads from her neck.

The High Court in analysing the evidence on identification of the appellant in its judgement stated that;

> ***"Like the learned Senior Magistrate, we appreciate that the conditions were not favourable for a positive identification but have come to the conclusion that the identification of the 1st appellant by the 2nd complainant was free from error and could be safely relied upon. The 1st appellant removed beads from the neck of the second complainant. He was therefore in close proximity with her. He further held her by the hand and led her to her house where he ordered her to sit down after she had given him Ksh. 9,000/=, a nokia mobile phone and scratch cards. He also took her handbag containing assorted clothes. These events took some time and the 1st appellant and the 2nd complainant were in close proximity with one another. The second complainant stated that she recognized the 1st appellant with the aid of light from the torches carried by the 1st appellant and his colleague who was armed with a gun. The first complainant therefore had sufficient opportunity to identify the 1st complainant by recognition."*** (Emphasis ours)

Having found that the prevailing conditions at the time of the robbery were not favourable for a positive identification, the High Court fell into grave error by thereafter finding that those conditions were favourable with regard to the appellant. This was a dark night, hence the use of the torches by the robbers. There were six robbers, armed with a firearm. There was no evidence of the intensity of the torch light or even the direction the light faced. How was the 2nd complainant able, in these circumstances, to identify (recognize) the appellant? But more importantly, even though the 2nd complainant said she knew the appellant previously, according to PW7, the Investigating Officer, when he interviewed both PW1 and the 2nd complainant immediately after the attack they told him that the attackers were Turkana men. But they specifically mentioned the name of **Napokol,** the 2nd accused person who was acquitted by the learned trial magistrate. This was the first opportunity for 2nd complainant and she ought to have told the police categorically that she identified the appellant as a member of the gang that robbed her.

This Court has emphasised the importance of giving the description or name of the robbers by the victims at the earliest opportunity as evidence that they are not mistaken as to the identity of the robbers. See

This failure coupled with lack of evidence as to the manner the appellant was arrested, leaves us in no doubt that it was unsafe in the circumstances to convict on the evidence of a single witness.

We shall resolve this doubt in favour of the appellant. Accordingly we allow this appeal, quash the appellant's conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 17th day of October 2013

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mgkm