IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 327 OF 2012

BETWEEN

JACOB MUTEMBEI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit & Makau, JJ.) dated 19th July, 2012

in

H.C.CR.A NO. 45 OF 2010)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court dated 19th July, 2012 wherein the appellant's first appeal was dismissed. ***Jacob Mutembei,*** the appellant, was charged with the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code, Chapter 63***, ***Laws of Kenya***, in the Senior Principal Magistrate's Court at Maua. The particulars of the offence were that on 17th June, 2009 at Muringene Location in Igembe South District within the then Eastern Province the appellant jointly with another not before the court robbed Daniel Kabaya Ngore of a mobile phone make Nokia 6070 and miraa all valued at Kshs. 9,000/= and at or immediately before or immediately after the time of such robbery assaulted the said Daniel Kabaya Ngore.

[2] The appellant pleaded not guilty, the prosecution called a total of five witnesses in support of its case. It was the prosecution's case that on 17th June, 2009 at around 11:00 a.m PW1, Daniel Kabaya Ngore (Daniel), was heading to Muringene carrying some miraa. On the way near the Independent Church, he met two men who enquired from him the price of the miraa he was carrying. Daniel gave a bunch of the miraa to one of the men who he called *rasta* informing them that he would sell it for Kshs. 200/=. As Daniel was negotiating with the men over the purchase price PW2, Charles Mungathia (Charles) and PW5, Patrick Mugambi Kauku (Patrick), who were also heading to Muringene passed them.

[3] Charles and Patrick testified that they recognized one of Daniel's customers as the appellant. Charles and Patrick had barely walked for 20 metres when one of the men slapped Daniel on his left cheek causing him to fall down. The man who had taken hold of the *miraa* took off with it. It was Daniel's evidence that when he fell down the man who had slapped him stepped on his right hand and took the mobile phone he was holding on the said hand. Daniel started screaming attracting the attention of both Charles and Patrick who decided to turn back. Both Charles and Patrick testified that when they reached, Daniel was lying on the ground. They stated that they saw the appellant whom they both knew prior to the incident stepping on Daniel's right hand and snatching his mobile phone. Charles and Patrick tried to apprehend the appellant but he ran away.

[4] Daniel testified that he had recognized the appellant during the incident because he used to see him at Muringene market but did not know his name; Patrick informed Daniel that the appellant's name was Jacob. PW4, PC John Maina (PC John), gave evidence that on the same day at around 1:45 p.m Daniel reported the incident at Maua Police Station. He stated that Daniel informed him he had been attacked by two robbers one of whom he knew as Jacob. On 19th June, 2009 PC John requested the area chief to trace the robbers. It is the area chief who apprehended the appellant and the police later charged him with the offence of robbery with violence.

[5] The appellant gave a sworn statement in his defence. He denied committing the offence and maintained that the charge was fabricated against him by Daniel because of an ongoing land dispute involving the two of them. He testified that on 17th June, 2008 he was fencing his shamba at *'Jangwani';* he completed fencing his shamba on 18th June, 2008. He stated that he was arrested on 19th June, 2008 while buying drugs at Muringene market.

[6] The trial court was satisfied that the prosecution had proved its case to the required standard; the appellant was convicted and sentenced to death. Aggrieved with the trial court's decision, the appellant filed an appeal in the High Court. The High Court (**Lesiit & Makau, JJ.)** in their judgment dated 19th July, 2012 dismissed the appeal. It is that decision that provoked this second appeal which is based on the following grounds:-

1. ***The learned Judges erred in law by finding that the appellant was properly identified whereas the complainant never gave the police the description of his assailants but relied entirely on PW5's knowledge of the appellant yet PW5 was neither present when the arrest was made nor did he identify the appellant in a properly constituted identification parade.***

2. ***The learned Judges erred in law by not properly evaluating the entire evidence on record which would establish that the appellant was neither armed with a dangerous weapon nor did he use any other personal violence against the complainant.***

3. ***The learned Judges erred in law by ignoring the defence of the appellant considering there was allegedly a second assailant who was never pursued thereby raising reasonable credibility to the appellant's defence that there was grudge between him and the complainant.***

4. ***The learned Judges erred in law by not addressing the issue of sentencing despite the same being a ground of the first appeal which is manifestly harsh and excessive considering the circumstances and the particulars of the charge.***

[7] In amplifying the above grounds, Mr. Kaumbi, learned counsel for the appellant, submitted that no description of the appellant was given to the police prior to his arrest. Failure to give the description of the assailant lends credence to the defence by the appellant that the charge was fabricated due to an existing grudge arising out of a land dispute. He argued that, Patrick, who claimed to have recognized the appellant as one of the robbers was neither present when the appellant was arrested nor did he participate in an identification parade. According to Mr. Kaumbi the identification of the appellant was dock identification because the complainant did not know the appellant prior to the incident. He maintained that an identification parade ought to have been conducted.

[8] Mr. Kaumbi further argued that the High Court as the first appellate court failed in its duty to properly re-evaluate the evidence that was tendered in the trial court; if the learned Judges properly re-evaluated the evidence they would have found that there was no evidence to demonstrate that appellant was armed with any weapon; or that any violence was used; or that any property was taken by force during the incident. He submitted that the appellant was not found in possession of the allegedly stolen *miraa* or the mobile phone; there was evidence of an apparently second assailant who was known as *Rasta*; a report was made to that effect, nonetheless, there was no effort made to pursue *Rasta*; according to the evidence, the complainant was able to identify this *Rasta* who was not charged which goes further to confirm there was a grudge between the appellant and Daniel; therefore the appellant's defence was reasonably credible.

[9] Mr. Kaumbi went on to submit that there were discrepancies in Daniel's evidence because at one point in his evidence in chief he stated that he was not acquainted with the appellant but knew the other robber who he referred to as *Rasta;* in the same breath Daniel said he knew the appellant as Jacob prior to the incident. He argued that Daniel's evidence on recognition was not reliable to justify conviction of the appellant. Lastly, counsel submitted that the High Court failed to address its mind on the issue of severity of sentence handed to the appellant. He maintained that based on the circumstances under which the offence was allegedly committed, the sentence issued was too harsh. He urged us to allow the appeal.

[10] On the part of the State, Mr. Motende, learned counsel for the respondent, opposed this appeal and supported the conviction and sentence against the appellant. He argued that the evidence of PW5 was that of recognition as he knew the appellant well since childhood and gave the appellant's name. According to Mr. Motende even if PW5 was not present during the appellant's arrest there was no need to conduct an identification parade because it would have been a waste of time since he was well known to PW5. He argued that there was clear evidence that the appellant used personal violence on Daniel by slapping him on the left cheek; therefore, a necessary ingredient of offence of robbery of violence was established. According to Mr. Motende, the appellant's defence was an afterthought; the death sentence is the only legal sentence prescribed by law for an offence of robbery with vilence.

[11] This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it 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 ***Chemangong -vs- R [1984] KLR 611***. In ***Kaingo -vs- R*** **(1982) KLR 213 at p. 219** this Court said:-

> ***"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 (Reuben Karari c/o Karanja -vs- R (1956) 17 EACA 146)"***

[12] In view of the aforementioned summary of the background information, the issues arising for our determination are twofold;-

- ***Was the evidence of identification/recognition free from error?***

- ***Did the leaned Judges of the High Court properly re evaluate the evidence as is the duty of the 1st appellate court?***

It is common ground that the appellant was not found in possession of any stolen items. PW1, PW2 and PW5 gave evidence that they had recognized the appellant as one of the robbers because they knew him prior to the incident. PW1 and PW2 testified that they knew the appellant by appearance and not by his name. It was PW5, Patrick's evidence that he had known the appellant since childhood and they came from the same village. It was Patrick who told PW1 the appellant's name was Jacob. Based on the foregoing the only evidence that was adduced against the appellant was based on recognition by a single

witness.

[13] It has been emphasized in several decisions by this Court and it bears repeating that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In ***Wamunga -vs- Republic, (1989) KLR 424*** this Court held at page 426 that,

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

Further in ***Simiyu & another – vs- Republic {2005} 1 KLR 192***, it was stated that,

> ***"In every case where there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."***

[14] Accordingly, we have to examine whether the evidence of recognition of the appellant and the mere mention of the name '**Jacob'** by the complainant who made the report to the police and did not give any description could lead to the arrest of the assailant by an area chief, was foolproof and safe to sustain conviction? Daniel, in his evidence stated that he used to see the appellant at the market prior to the incident; he only came to know the appellant's name when he was arrested. In the same breath and in contradiction to his earlier evidence, Daniel testified that when he made his initial report he gave the police the appellant's name. Further, PW4, PC John, testified that Daniel in his initial report stated that it was one '**Jacob'** who had robbed him. PW1, PW2 and PW5 testified that they were able to recognize the appellant during the incident; however none of them gave a description of the appellant to the police.

In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court held,

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."***

[15] It was the prosecution's case that after the incident was reported, PC John requested the area chief to trace the robbers. The question that arises is; how was the area chief able to trace the appellant and was the appellant the only one bearing the name **'Jacob'** in the area? It was the prosecution's evidence that none of the witnesses who claimed to have recognized the appellant was present during the arrest. Thus the question of who pointed out the appellant to the chief as one of the robbers is a lingering one. In our respectful view, in the absence of the description of the assailant or the witnesses to point him out, it was possible for the area chief to arrive at a wrong conclusion and arrest a wrong person bearing the name '**Jacob**'. Many people share a name. To compound this problem, there was no identification parade mounted to test whether the appellant could identify the assailant.

[16] That being our view of the matter, we find this appeal has merit. We allow the appeal, quash the appellant's conviction, set aside the sentence of death imposed by the High Court and order the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 28th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR