IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NOs. 110 OF 2014 & 4 OF 2015

BETWEEN

SAMUEL KARANJA.....1ST APPELLANT

KENNEDY PETER MENGO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Mombasa (Kasango & Muya, JJ.) dated 19th March, 2014

in

H.C.CR.APP. No. 154 OF 2012)

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JUDGMENT OF THE COURT

Hans Christian (PW1) and **Dorris Molstid** (PW2) are husband and wife of Danish descent. On 23rd November, 2010 they landed in the country as tourists. They were accommodated at Leopard Beach Hotel, Diani in Kwale County. On 24th November, 2010 at about 10.15 a.m. they took a stroll. Just a few metres from the gate they were accosted by two men who were armed with a knife. They jumped on to them from behind a tree. Whereas one of them was tall, the other was short. A struggle ensued between the two men, PW1 and PW2 as the men attempted to forcefully snatch a wallet from PW1's hand and PW2's waist bag. One of the men pulled out a knife and held it against PW2's neck. That is when the men managed to snatch PW2's wallet which contained 15 dollars, opened it up, took the dollars before running away towards the beach.

Meanwhile just 50 metres or so from the scene of attack **Benjamin Mbevi** (PW3) a security guard was on patrol near the hotel when he was attracted by screams by PW1 and PW2. On checking the direction he saw PW1 and PW2 struggling with two men. He shouted at them and the two men left them and fled towards the beach. He immediately activated his alarm and contacted another guard on the beach,

Joseph Mwanake Makonge (PW4) who together with other security guards nearby blocked the beach road and within no time saw some men approach whom they immediately apprehended. PW4 then called PW3 and informed him of the arrest. PW1, PW2 and PW3 headed for the beach and when the two men were presented to them, they immediately confirmed that they were the very people who had just robbed them. Those two people are the appellants. They were all then taken to Diani Police Station and handed over to **P.C. Nicholas Sigei** (PW6) who in turn handed them over to P.C. **Patrick Kuranga** (PW 7), the investigating officer.

Upon further interrogation of the appellants, PW7 was satisfied that they had committed the offence. He accordingly preferred against them a single count of robbery with violence contrary **to section 296(2)** of the Penal Code with brief particulars being that the appellants on 24th November 2010 along beach road in Diani Kwale County jointly with others not before court while armed with dangerous weapons namely a kitchen knife robbed Dorris Molstid a waist bag containing cash 15 US dollars and sun glasses and at or immediately after the time of such robbery threatened to use actual violence against the said Dorris Molstid.

When presented before the Principal Magistrate's Court at Kwale on 25th November 2010 for plea, they both entered a plea of not guilty and soon thereafter their trial ensued. At the close of the prosecution case and when found that they had a case to answer the 1st appellant elected to make a sworn statement of defence and called one witness whereas the 2nd appellant gave an unsworn statement and called no witness. The 1st appellant stated that on the date of the alleged offence he was conducting his business on the beach when a security guard confronted him and ordered him to stop. It was then that he accused him of having stolen some money from some tourists. The tourists were subsequently brought to where he was and together were taken to Diani Police Station. His witness, **Kimanthi Matheka** (DW3) confirmed that on the day of the robbery he had met the 1st appellant at 10.00 a.m. He had been sent to the appellant's house to deliver a message regarding a lady who was selling her stall along the beach in which the appellant was interested. He was surprised to hear later that the 1st appellant had been arrested.

As for the 2nd appellant, his defence was that on the said date he was on the beach going about his business when a security guard confronted and apprehended him accusing him of participating in a robbery with the 1st appellant, a person who was a stranger to him. They were later charged with an offence he knew nothing about.

At the conclusion of the trial, the trial court took the view that there was overwhelming evidence to support the prosecution case which the defence had not displaced. It also found the appellants' defences not truthful. That formed the basis of the appellants' conviction and subsequent sentence to death. After this conviction and sentence the appellants appealed to the High Court (**Kasango** and **Muya JJ.**) which came to the conclusion that the appeal lacked merit and dismissed the same in rather short findings that; the judgment of the trial court had been duly signed, death sentence is mandatory upon conviction on capital offence and the request of the appellants for the case to be adjourned as they were not ready to proceed was rightly rejected.

Naturally the appellants now come before this Court on a second and perhaps final appeal. That being so only matters of law fall for consideration – see **Section 361** of the Criminal Procedure Code. As this Court has stated many times, it will not normally interfere with the 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 **Chemagong v R (1984) KLR 611.**

The 1st appellant drew up the memorandum of appeal filed in court in person on 22nd January, 2016. Later when he appointed **Messrs Mochere & Company Advocates** to act for him, the firm drew and filed supplementary grounds of appeal on 24th February, 2016 and 30th March, 2016. Similarly, when Messrs **Ngumbau Mutua and Associates** were appointed to represent the 2nd appellant they also filed supplementary grounds of appeal on 6th May, 2016. The common thread in all these grounds is that the High Court failed in its statutory duty of evaluating the evidence afresh so as to reach its own conclusion as to whether to uphold the trial court's judgment; that the proceedings before the trial court were a nullity as they were conducted in violation of **Articles 2(1) (2) (3), 50(4)** and **165(1) 3(b**) of the Constitution; and that the identification of the appellant was doubtful.

Mr. Mochere, learned counsel for the 1st appellant submitted that PW1 and PW2 having been pounced upon by two men from behind a tree, they had no time to identify them. That PW3 who purported to identify the appellants in action was far away. That no wonder PW3 was unable to describe the appellants to his fellow security guards at the beach. According to counsel, the 1st appellant was arrested on mere suspicion, and suspicion alone cannot form a basis of conviction. Counsel further submitted that no police identification parade was conducted. That being the case, the identification of the appellant was dock identification which is generally worthless. The other ground argued by counsel was that on the day the appellants took the plea, the court acceded to the prosecutor's application to have the case heard the following day. The appellants opposed the application on account of the injuries they had sustained during the arrest when they were assaulted by the mob. To the appellants, that hurried trial violated the fair trial articles in the Constitution; that is to say **Articles 2, 50 and 165.** Finally, on the 1st appellant's defence, counsel submitted that the same was sworn and was never rebutted. However both courts never appreciated the defence. In support of all his submissions counsel relied on the following authorities:

1. Gabriel Kamau Njoroge v Republic (1982-88) 1KAR 1134

2. Walter Awiyo v Republic (1991) 1 KAR 254

3. Sawe v Republic (2003) KLR 364

4. David Njoroge Macharia v Republic Criminal Appeal No. Nbi 197 of 2007 (UR)

5. Johana Ndungu v Republic (1996) eKLR

6. Karanja v Republic 1995 (1983) KLR 501

7. Thomas Patrick Gilbert Cholmondeley v Republic (2008) eKLR

Mr. Ngumbau, learned counsel for the 2nd appellant associated himself with the submissions made by counsel for the 1st appellant. He however reiterated that the circumstances of the robbery did not favour positive identification of the appellants. The non-description of the robbers especially by PW3 to PW4 made the possibility of mistaken identification of the appellants probable. That neither PW1, PW2 nor PW3 were present during the arrest of the appellants. He further submitted that this was not a case of chase and arrest. Counsel submitted further that the evidence of identification has to be treated with circumspection even if the attack was during the day. Counsel submitted that looking at the entire judgment of the High Court, one is left wondering whether it subjected the evidence of the trial court to fresh and exhaustive examination so as to reach its own conclusion. Lastly, counsel submitted that the 2nd appellant, from the record, actually never participated in the appeal. For his submissions counsel relied on the following authorities-

1. R vs Turnbull and Others (1976)3 ALL ER 549

2. Joseph Ngumbao Nzaro vs Republic (1988-1992) 2 KAR 254

3. Roria vs Republic (1967) EA 583

Responding, **Mr. Musyoki**, Senior Prosecution Counsel submitted that the evidence of identification of the appellant was overwhelming as the robbery was committed at 10.00 a.m. in the morning. There was therefore no possibility of any error on the part of PW1, PW2 and PW3 who witnessed the robbery. That PW4 arrested the appellants on the beach and when PW1, PW2 and PW3 were summoned they positively identified the appellants as the robbers. It was submitted that though the appellants were not represented by counsel in the two courts below, their rights to a fair trial were not compromised. With regard to whether or not the 2nd appellant was present during the hearing of the appeal in the High Court, counsel urged us to call for and peruse the original record of the High Court and if it is confirmed that indeed the 2nd appellant never prosecuted his appeal, then we should order the re-hearing of the appeal.

We deem it appropriate to deal first with the issue whether or not the 2nd appellant prosecuted his appeal in the High Court. If it is established that indeed he did not, then obviously there is no appeal from the High Court before us for determination. The record before us shows that the 2nd appellant filed his appeal in the High Court in person on 6th August, 2012 whereas the 1st appellant's appeal was filed through Messrs **Kariuki Gathuthi & Company Advocates** on 31st July, 2012 and subsequently amended on 13th September, 2013. The record also shows that the 2nd appellant filed his written submissions in Kiswahili dated 24th December, 2012. This was long before the hearing of the appeal. The first time the appeal came up for hearing was 4th September 2013. From the intitulement it is self evident that it was only the appeal by the 1st appellant that was scheduled for hearing on that date. The appeal is indicated as number 154 of 2012 and the parties given as **Samuel Karanja v Republic**. There is no mention of the appeal by the 2nd appellant. On that day the coram shows that only the 1st appellant and his counsel were present. Counsel for the 1st appellant applied and was granted leave to amend the grounds of appeal. When the appeal next came up for hearing on 15th October, 2013 only the 1st appellant and his counsel were present again**. Mr. Mungai** appearing for the State is recorded as saying ***"…. Appeal is only by Samuel Karanja against lower court's judgment. The appellant is represented by counsel …."*** From there counsel for the 1st appellant made his submissions in support of the appeal. Mr. Mungai opposed the appeal and judgment was set for 28th November, 2013. On this date, again only the 1st appellant was present.

We have called for the original record of the High Court. It is no different from what we have set out above from the typed record. For all intents and purposes therefore the 2nd appellant's appeal was never heard by the High Court. We are therefore surprised that in the judgment of the High Court, the opening line is that ***"…. The two appellants were convicted and sentenced to suffer death for the offence of robbery with violence …."***The presumption here is that the appeals by the two appellants had been canvassed before them which was not the case. Even if that had been the case, where is the order of consolidation of the two appeals, if at all"

The 2nd appellant was thus condemned unheard in the High Court which flies in the face of fair trial provisions of the Constitution as well as the doctrines of natural justice. We do not however want to assume that the omission was deliberate. We can only attribute it perhaps to an unfortunate lapse on the part of the judges who presided over the appeal. We must however reiterate that in criminal proceedings where the liberty of an accused is at a risk, there should be no room for such acts of omission or commission. It behoves the courts to approach such proceedings with great care and circumspection. What order then commends itself to us in the circumstances" We shall leave the

answer to the tail end of this judgment.

We now turn to the grounds in support of the 1st appellant's appeal. On the ground that the 1st appellate court failed, to re-analyze and re-evaluate the evidence on record exhaustively so as to reach its independent conclusion, it would appear that the judgment of the court supports this contention. Nowhere does the High Court subject the evidence of the trial court to any fresh or exhaustive re-examination. The judgment is simply structured in this manner; page 1 is the introduction dealing with the offence charged, the conviction and sentence of the appellants by the trial court. The 2nd page is on the number of the prosecution witnesses followed by brief facts of the case. Page 3 is dedicated to the grounds of appeal as well as amended grounds of appeal. Pages 4, 5 and 6 are the judges' response to the amended grounds of appeal regarding whether or not the judgment of trial court was signed and the constitutionality of the death penalty with extensive quotes from cited authorities. In page 7 the judges deal with the complaint regarding the refusal by the trial court to adjourn the hearing of the case soon after they were charged as they had been injured during their arrest and on page 8 they conclude thus:-

"…. Having carefully analysed the record of the proceedings we are satisfied that the conviction was safe and the sentence was legal …."

Dealing with the duty of the 1st appellate court in the case of **Gabriel Kamau Njoroge** (supra) this Court observed:-

"**…. As this Court has constantly explained, it is the duty of the first appellate court to remember that parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the first appeal and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect …. If the High Court has not carried out its task, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and nondirection on material points are matters of law …."**

At the hearing of the appeal in the High Court, the 1st appellant had submitted that considering the manner the offence was committed, positive identification of the perpetrators was well nigh impossible, that there was no description of the features of the perpetrators by either PW1, PW2 or even PW3 to PW4 who arrested the appellants. The possibility that the appellants could have been victims of mistaken identity had not been eliminated more so since PW1, PW2 and PW3 were not present when the 1st appellant was arrested; there was no evidence as to who pointed out the appellants to PW4; this was not a case of chase and arrest where the chaser never lost sight of the suspect; the road on which the appellants are alleged to have run on to get away was a public road with busy human traffic at the time; and finally, that PW3 only saw the attackers run towards the beach but never claimed to have seen their faces. Then there was the issue whether in the circumstances, a police identification parade ought not to have been conducted. All these questions deserved interrogation by the High Court and answers given. As it is the High Court simply brushed them aside. Given the foregoing failures, we doubt whether the 1st appellant's conviction can be said to have been safe. He may well have been a victim of mistaken identity. All these submissions required thorough consideration by the High Court and this could only be done by subjecting the evidence of the trial court to fresh and exhaustive re-examination. This statutory requirement was obviously overlooked in this appeal. The High Court appears to have been carried away by the evidence of PW1, 2, 3 and 4 regarding the arrest of the 1st appellant. That the 1st appellant was soon after the incident arrested by PW4. Following the arrest PW1, 2 and 3 came by who immediately identified the 1st appellant as one of those who had attacked and robbed them a short

while ago. The action by PW4 of exposing the 1st appellant to the victims was wrong and prejudicial to the 1st appellant and the High Court failed to caution itself of the fact that it is very likely and very natural that a complainant confronted with an individual arrested soon after the robbery on them, would mostly conclude that the person so arrested was the robber. See **Paul Mwaniki Kitilu v Republic, Criminal Appeal No. 270 of 2007 (UR)**. We think that what PW4 should have done upon arrest of the 1st appellant was to alert the police who would have taken him straight to a police station pending the conduct of a police identification parade to see whether the witnesses could identify him.

The record shows that the appellants were first presented in court on 25th November 2010 to take the plea. They pleaded not guilty to the charge whereupon the prosecutor applied that because PW2 who was the complainant was a tourist and was due to leave the country on 28th November 2010, that there be a special hearing. The appellant opposed the application on the grounds that they were injured during the arrest and required medical attention. The trial court appears to have acceded to their request and directed that they be taken for treatment and an update on their condition availed to court the following day. The following day the appellants were availed in court and when the prosecution intimated that he was ready to proceed with the case, they protested saying that they were still not ready on account of the very injuries. However, the trial court overruled their objection and directed for the case to proceed. The appellants challenge these proceedings on account of breach of fair trials articles of the Constitution. Essentially they are saying that they were not accorded adequate time and facilities to prepare their defence, to choose, and be represented by an advocate, and to be informed of this right promptly, to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

On the face of it, it appears that indeed there was violation of **Article 50** of the Constitution. The appellants took the plea and the following day were subjected to a trial despite their sickly condition occasioned by mob justice or injustice administered on them during the arrest. Of course we appreciate the trial court's concern regarding the fact that the complainant was a tourist just about to leave the country. However can mere convenience of a witness override the provisions of the Constitution" We do not think so; more so in a case like this where the appellant had been seriously injured during their arrest and which the trial court observed. The complainant's convenience had to be measured and or counterbalanced against the injustice and prejudice that may be caused to the appellants. There was nothing on record to indicate that the complainant could not have testified any other time or through other means. In the absence of any satisfactory reason and the exploration of other ways in which the complainant would have been assisted to testify at an appropriate time, we are satisfied in the circumstances of this appeal that the appellants' complaints regarding violation of their fair trial provisions of the Constitution are valid.

What we have said is sufficient to dispose of this appeal. In so far as the 1st appellant is concerned, the appeal is allowed, conviction quashed and sentence imposed set aside. He shall forthwith be set at liberty unless otherwise lawfully held.

How about the 2nd appellant" As we have already stated, his appeal was never heard at all by the High Court. Both counsel for the 2nd appellant and State are in agreement that the best order to make in the circumstances is for the re-hearing of the appeal. We are reluctant to take that route though, for the simple reason that this judgment is binding on the High Court. Having found for the 1st appellant on the issues which equally faced the 2nd appellant, what purpose will be served with the re-hearing of the 1st appellant's appeal". Will it not be just a case of going through the motions when the outcome of the appeal is already known. We do not think that the judiciary can afford such luxury. Judicial time and resources must be put to good use. We do not think that such purpose will be achieved if we were to order a re-hearing of the 2nd appellant's appeal.

We would in the premises quash his conviction as well and set aside the sentence imposed on him. He should similarly be set free unless otherwise lawfully held.

Dated and delivered at Malindi this 17th day of June, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR