Case Number:	Criminal Appeal 250 of 2011
Date Delivered:	11 Mar 2016
Case Class:	Criminal
Court:	Court of Appeal at Mombasa
Case Action:	Judgment
Judge:	Milton Stephen Asike-Makhandia, William Ouko, Kathurima M'inoti
Citation:	Mohammed Mwalimu Mohamed v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 250 OF 2011

BETWEEN

MOHAMMED MWALIMU MOHAMED .....APPELLANT

AND

REPUBLIC…….....……..RESPONDENT

(Being an appeal from the Judgment of the High of Court of Kenya at Mombasa (Ojwang & Odero, JJ.) dated 6th September, 2011

in

H.C.CR.APP. No. 184 of 2006)

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JUDGMENT OF THE COURT

On or about 2nd August, 2005 at about 6.00 p.m., the complainant, **Hadija Ahmed** (PW1) stepped out of her parents' house to go to the nearby shops. She was sent by her mother **Fauzia Nduku Mutiso** (PW2) to buy some utilities. She was in possession of her mobile phone, a Samsung and cash Kshs.1,500/-. She was however immediately confronted by three men one of whom she recognized as the appellant who went by the nickname, **Amadiga** in the estate. She had known him in excess of three years as he resided in the estate and was also a *matatu* tout on the Bamburi route in Mombasa. The appellant then held a knife on her and ordered her to hand over the mobile phone but when she resisted, the appellant ripped off the pocket of her jacket and removed the mobile phone and cash. The three men then melted into thin air leaving behind PW1 screaming. The screams attracted the attention of PW2 who came out of his house whereupon the complainant immediately named the appellant as having been among the robbers. PW2 also knew him very well and confirmed the fact that he went by the street name, "*Amadiga*". With the assistance of some of the residents of the estate they went out looking for the appellant to no avail.

Next morning PW1 and PW2 proceeded to Nyali Police Station and reported the incident. **P.C. Fairfax Masinde** (PW4) received the report. Once again PW1 gave the name Amadiga to PW4 as having been a member of the gang that robbed her of her items the previous evening. Asked how she was able to recognize the appellant among the robbers, PW1 stated that when the incident happened it was not yet dark and in any case security lights at the scene were on. Further that the appellant was in very close proximity with her during the incident. Accordingly, she could not have mistaken him for anybody else. PW4 also knew the appellant very well. Apparently, he was alleged to be a serial robber, since at the time of the incident he was facing nine other charges of robbery with violence, in various courts some of which had been investigated by this witness.

On 1st September, 2005 at about 8.00 p.m. **PC Jonathan Partimo** (PW3) in the company of **PC. Wachira** and **PC. Lotodo** were at Nyali Police Station when members of the public came and complained to them that robbers were harassing them in Mwandoni area and needed their intervention. They mentioned the appellant as being among them. The trio planned on a raid which was successfully executed. Among those arrested was the appellant alongside four others. He was brought to the police station and was re-arrested by PW4 who went on to charge him with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. It was alleged in the particulars that the appellant on 2nd August, 2005 at around 7.00 p.m. at Mwandoni Village in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons, namely knives, robbed **Khadija Ahmed** of a mobile phone make Samsung valued at Kshs.7,000/- and cash 1,500/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Khadija Ahmed.

The appellant when presented before the Chief Magistrate's Court at Mombasa on 12th September, 2005, entered a plea of not guilty. In unsworn statement from the dock he testified that he was a resident of Mwandoni and that on the day of his arrest, he was on his way home when he was arrested in a police swoop and was asked for his identity card. He had Kshs.20,000/- and four golden rings which the police took before locking him up at Nyali Police Station. It was then that PW4 informed him that he was the Amadiga who had previously robbed a lady. He then charged him with the offence he knew nothing about.

The trial court was not convinced by the defence advanced by the appellant. It found it to be unbelievable and lacking in merit on account of the overwhelming evidence marshalled by the prosecution. On the other hand, the trial court considered the identifying witness of the prosecution to be honest, and excluded altogether any possibility of mistaken recognition. Accordingly the appellant was convicted on the charge and sentenced to death. He appealed to the High Court against both conviction and sentence. The appeal was dismissed by **Ojwang J.** (as he then was) and **Odero, J.** who echoed the trial court's findings, on identification and rejection of the appellant's defence. It is in those circumstances that the appellant now finds himself before us.

The appellant advanced five grounds of appeal filed initially in person that the evidence of identification was not free from possibility of error; that the investigating officer did not testify; that those who went looking for him after the incident did not testify; that both courts below failed to take into account the contradictions in the prosecution case; and lastly that the appellant's defence was not given due consideration.

In due course, **Mr. Nabwana**, learned counsel was appointed by Court to represent the appellant. With the permission of the court, he on 26th January, 2016 filed three supplementary grounds of appeal; reiterating and reinforcing the doubtful nature of the evidence of identification.

Arguing the appeal, Mr. Nabwana submitted that the two courts below reached points of fact without proper analysis of the evidence on record; that the appellant was not given a chance to mitigate before the sentence was imposed and contravened **Section 329** of the Criminal Procedure Code; that his conviction turned on the uncorroborated evidence of a single identifying witness; that he was arrested a month later which was surprising given that PW1 claimed to have recognized him during the incident; and that the complainant having not given earlier the description of the appellant, the subsequent police identification parade mounted was superfluous. Infact according to counsel, that evidence was of the weakest kind and should not have been relied on. For this proposition, counsel relied on the case of **Kiarie v Republic (1976 – 1985) EA 213** and **Issa Ismael Makori v Republic NKR Cr. Appeal No. 292 of 2006 (UR).** Finally, counsel submitted that crucial witnesses, such as members of the public who

went looking for the appellant soon after the incident were never called to testify, thereby weakening the prosecution case further. Counsel relied on the case of **Ahmed Salim & Anor v Republic Msa Cr. App. No. 38 of 1997 (UR**) for that proposition.

Responding, **Mr. Wamotsa**, learned Senior Prosecution Counsel submitted that PW1 positively recognized the appellant during the robbery whom she had known for well over three years. The conditions obtaining at the scene were favourable for positive recognition. Counsel further submitted that this being a case of recognition as opposed to visual identification of a stranger, police identification parade was unnecessary.

With regard to failure to call some witnesses counsel submitted that it had not been demonstrated that they were key witnesses or that had they been called they would have given evidence adverse to the prosecution. In conclusion, counsel maintained that it was not the number of witnesses called that counts. Rather it is the weight to be attached on the evidence of such witnesses. All said and done, counsel was of the strong view that the appellant's conviction was safe and therefore the appeal ought to be dismissed.

Being a second appeal, only points of law may be put forward for our consideration. See **section 361(1)** of the Criminal Procedure Code. It is also the duty of the Court on a second appeal to decide whether a judgment can be supported on the facts as found by the trial and first appellate court as this is purely a point of law. See **Okeno v R (1972) EA 32 at page 36**.

So what are the issues of law raised in this appeal" We think that those issues are; failure to allow the appellant to mitigate before sentence, evidence of identification and failure to call certain witnesses.

On mitigation, the record shows that after the appellant was convicted and the prosecutor indicated that the appellant had one previous relevant conviction but he had no record to back up that conviction, he asked that the appellant be treated as a first offender, whereupon the appellant was called upon to mitigate. However, instead of mitigating or even keeping quiet if he had nothing to say in mitigation, he embarked on a tirade against the court claiming that it had oppressed him and as a result he had lost faith and confidence in it; that the court had convicted him on no evidence at all; and that his rights had been infringed upon. This forced the trial magistrate to intervene and stop the circus. Accordingly he ignored the tantrum and for good measure advised the appellant that he would have an opportunity to question the judgment in the High Court. Indeed and as earlier stated he duly but unsuccessfully questioned the judgment in the High Court on appeal. The appellant having been given an opportunity to mitigate and instead having veered off the target and became abusive of the trial court, what was the court supposed to do in the circumstances" We think that the court was right in cutting short his unsolicited offensive against it. The appellant cannot now be heard to complain that he was not accorded an opportunity to mitigate.

No doubt, and as correctly submitted by counsel for the appellant, where the evidence relied on to implicate an accused person is entirely of identification, the evidence has to be absolutely watertight and safe to justify a conviction and before a conviction can be heard; and in almost every case in which an immediate report to a police officer has been made by someone who is subsequently called as a witness, evidence of the details of such report should always be given at the trial. In our view this is a proper position of the law as set out in the case of **Kiarie v Republic** (supra), which we think counsel for the appellant heavily borrowed from. However the learned counsel in relying on this proposition did not appreciate that it was made in respect of visual identification of a stranger in difficult circumstances. The case under our consideration was one of recognition as opposed to visual identification of a stranger.

The two courts below took the same view. Indeed we agree with the said courts when they state that this was not a case of visual identification of a stranger where chances of mistaken identity are high but one of recognition. In **Anjononi & others v Republic (1976 - 80)1 KLR 1566**, this Court held

"…This was however a case of recognition not identification of assailant; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another …."

Being a case of recognition, there was no need to conduct a police identification parade. Indeed none was conducted. We do not know where counsel for the appellant got the impression that such parade was conducted. Much as PW1 was the sole recognizing witness, both courts below were of the view that she could not have been mistaken given that she had known the appellant in excess of three years; he was a resident of the estate; and was a *matatu* tout plying the route from the area to Bamburi. Further PW1 had spent considerable time with the appellant in close proximity during the incident. The appellant too had not disguised himself at all, and there was abundance of light at the scene of crime. She gave out the name of the appellant to her mother who was first to respond to her screams and thereafter in the company of her immediately went looking for the appellant in the estate albeit unsuccessfully. The following day when she reported the incident to the police at Nyali Police Station, she once again gave out the street name of the appellant. These were concurrent findings of the two courts based on the evidence tendered and we have no reason to interfere as correctly urged by Mr. Wamotsa. Indeed with this background and evidence, we cannot see how PW1 would have possibly been mistaken in her recognition of the appellant.

The trial court and the High Court found that PW1 and PW2 were honest witnesses. Being an observation regarding the demeanour of a witness this Court on second appeal will rarely differ with such a finding. Instead it has a duty to pay homage to it. We are also keenly aware that a witness may be honest but mistaken and a number of witnesses could all be mistaken. See **Roria v Republic (1967) E.A. 583** and **R v Turnbull (1976) 3 ALL E.R. 549**. The trial court and first appellate court excluded altogether the possibility of a mistake on the part of PW1 in the circumstances of this case and given the evidence on record, we cannot fault that conclusion.

The appellant has complained that neither the trial court nor the High Court warned itself of the dangers of convicting him on the evidence of only one identifying witness (PW1). That being the case he maintained it was unsafe to uphold the decision of both courts. This accusation is not entirely correct. In its judgment, this is how the trial court delivered itself on the issue

"…. I am alive to the fact that evidence of a single witness at night has to be tested with care before relying on it to base a conviction. Such evidence must also be watertight" See **Kamau v R (1957) E.A. 159**".

If this is not warning, what is it" The trial court having so warned itself, it was not necessary again for the High Court to repeat the warning.

On the claim that the prosecution did not call certain crucial witnesses, the appellant turned on the members of the public who accompanied PW1 and PW2 on the day of the robbery in the futile search for the appellant as being the absentee but crucial witnesses. We do not think that these were really crucial witnesses. Their evidence would most probably have been a replica to that of PW1 and 2 on the issue. In any case they never witnessed the robbery.

It is also the concern of the appellant that since the witnesses called were either related to the appellant

or were formal witnesses, these other witnesses would have provided the independent evidence required. We do not think that there is any depth in such submission. What matters is the weight or probative value to be attached to evidence and not the sheer number of witnesses or their relationship with the complainant. As correctly observed, the appellant did not demonstrate that the alleged witnesses had they given evidence, such evidence would have swayed the prosecution case. The case of **Ahmed Salim** (supra) relied on by the appellant on this score does not at all advance his cause.

In that case this Court observed:-

"…. The drugs in question were found in the house which the appellants had visited. The owner of the house and another who were arrested with the appellant were released and never called to testify at the trial. This raised the inevitable presumption that witnesses if called would have given unfavourable evidence against the prosecution …."

The situation here is completely different. The alleged witnesses only came to the scene after the robbery had been committed. Their role was limited to looking for the appellant which turned out to be an exercise in futility. What adverse evidence would these witnesses have given against the prosecution" We cannot discern of any.

We are therefore satisfied that the conviction and sentence entered against the appellant is sustainable. The appeal is accordingly dismissed in its entirety.

Dated and delivered at Mombasa this 11th day of March 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