REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 156 OF 2018

JOHN MUKARIA Alias SIMBA ……..…….. APPELLANT

VERSUS

REPUBLIC ……..……..……. RESPONDENT

(Being an appeal from the decision of Hon. A.G. Munene SRM in Maua Cr. Case No. 765 of 2013 made on 4/5/2018)

J U D G M E N T

1. On the morning of 14/2/2013 at about 4 am, **Joseph Maoka M'Munya** "the complainant'', was guarding his miraa at his farm when he was attacked by 3 people. He was hit with a panga on the head and grabbed one of them, the appellant. He bit his lips while they were struggling. The other two beat the complainant who let go the appellant. He screamed for help. The attackers made away with Kshs.1,700/-, a mobile phone valued at Kshs.2,500/- and a torch all belonging to the complainant.

2. **PW2 Andrew Mutea,** with whom the complainant was guarding the miraa had gone to check on another miraa farm . He heard the screams of his brother and rushed back. On his way back, he met 3 people running from the direction of the complainant's farm. He shone his torch and saw the appellant as the one leading the pack. They run away.

3. **PW2** did not find his brother where he had left him. He called out for him. When he emerged, he was bleeding profusely. He called his other brothers and took him first to Mutuati Police Station before heading to Mutuati Health Centre. One of the neighbours who responded to the complainant's screams was **Anjelica Karimi (PW3)**. She found the complainant at the scene and had been cut. There were 3 people there and when she shone her torch, she recognized the appellant. They run away.

4. **PW4 Clp. Henry Naibei** investigated the case. He visited the scene and established that the attackers wanted to steal miraa but found the owner whom they attacked. They stole from him the items the complainant had listed. He issued the complainant with a P3 form which was produced in evidence by **PW5 Lilian Muthui.** The appellant disappeared and was only arrested on 17/3/2013.

5. The appellant was thereupon charged with the offence of robbery with violence contrary to ***section 296(2) of the Penal Code.*** It was alleged that on 14/2/2013 at Ithuli Village, Kabachi Location in Igembe North District of Meru County, with others not before Court, the appellant robbed **Joseph Maoka** cash 1,700/-, a mobile phone valued at Kshs.2,500/- and a torch valued at Kshs.120/- and at or immediately before or after such robbery, the appellant used actual violence on the complainant.

6. On being put on his defence, the appellant stated that those were tramped up charges as he and the complainant had a land dispute as he had bought land from the complainant's brother. He called his wife **Lucy Muthoni (DW2)** as his witness. She told the Court that on the material day, she went to the farm with the appellant at 7 am. That the complainant had been lodging cases against the appellant.

7. On the foregoing evidence, the trial Court convicted the appellant of the offence and sentenced him to suffer death. It is against the said conviction and sentence that the appellant has appealed to this Court.

8. As held in **Okeno v. Republic [1972] EA 32,** this being a first appellate Court, the Court must re-appraise and review the evidence afresh and come to its own independent conclusions and findings.

9. The appellant raised 8 grounds of appeal which can be summarized as follows; ***that the trial Court erred; in holding that identification by recognition was sufficient yet the conditions for identification were difficult, in failing to consider that nothing was recovered from the appellant and that the weapon used in the commission of the offence was not recovered, in assuming that the appellant was the attacker yet there were 2 others, in failing to consider the appellant's defence of a long standing grudge over family land and, in holding that the prosecution case had been proved beyond any reasonable doubt.***

10. Both the prosecution and the appellant submitted on all the grounds together. The appellant contended that the conditions of

identification were difficult. The condition of the moonlight was not explained. He relied on the cases of **Toroke v. Republic Cr. A. No. 204 of 1987** and **Hassan Abdalla Mohaned [2017] eKLR,** on the likelihood of mistaken identity. He questioned the possibility of **PW3's** recognition of the appellant yet she stated that the appellant was wearing a cap which covered part of the face.

11. The appellant further submitted that the evidence of the prosecution was inconsistent and contradictory. That it was not clear how **PW2** came to the scene. That while **PW1** stated that there was a woman who came to the scene, **PW2** was categorical that there were only 3 brothers and no one else. He urged the Court to disregard the evidence of **PW2 and PW3.** He relied on the cases of **John Baraza v. Republic Cr. Appeal No. 22 of 2005** and **Bunkrish Pandya v. Republic (20) [1983 E.A.C.A** in support of those submissions.

12. On his part, **Mr. Namiti, the Prosecution Counsel** opposed the appeal and submitted that the prosecution had proved its case to the required standard. That there was prove that on the material day, it was the appellant with 2 others while armed with dangerous weapons who attacked and robbed the complainant of the items complained of. That the appellant was positively identified by **PW1, PW2 and PW3.** Finally, that the defence of the appellant was an afterthought.

13. This Court will also follow the format adopted by the parties and address all the grounds together. In the case of **Oluoch v. Republic [1985] KLR 549,** the Court held:-

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> ***a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***b) The offender is in company with one or more person or persons; or***
>
> ***c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person .."***

14. There was sufficient evidence that was tendered to show that the attackers were more than one in the present case. They were three to be exact. The evidence of **PW1** was that, he was hit with a panga twice on the head and with sticks several times on his back. **PW3** stated that he saw the appellant with a slasher. Those were dangerous weapons.

15. It was the evidence of **PW2** and **PW3** that when they saw the complainant, he was bleeding profusely. **PW5** produced a P3 form which proved that the complainant was seriously injured and the degree of injury was classified as harm. The injuries were inflicted during the robbery whereby the complainant lost Kshs.1,700/-, a mobile phone and a torch.

16. On the foregoing, the offence of robbery with violence was proved to the required standard. All that is in issue is, was the appellant part of the gang that attacked the complainant on that material morning? The central issue in this appeal is the identification of the appellant.0

17. In **Francis Kariuki Njiru & 7 Others v. Republic [2001] eKLR** the Court of Appeal held: -

> ***"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, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error".***

18. In **Donald Atemia Sipendi v.Republic [2019] eKLR,** Mativo J held:-

> ***"To determine whether identification is truthful, that is, not deliberately false, the Court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not a honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before".***

19. Finally, in **Toroke v. Republic [1987] KLR, 204,** the Court of Appeal held:-

> ***"It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification".***

20. The evidence of identification before the trial Court was that of recognition. **PW1** stated that he recognized the appellant as he grabbed and struggled with him. He even bit his lip. That there was moonlight which enabled him to identify the appellant. The appellant was well known to the complainant before the incident. The complainant stated that the previous evening at 7 pm, the appellant had seen him pass near his Kiosk.

21. The further evidence of identification was by both **PW2 and PW3.** When **PW2** heard the complainant scream, he hastened back and met 3 people running away from the direction of the screams. He shone his torch and recognized the appellant as he was ahead of the pack. **PW3** likewise told the Court that she shone her torch when she came to the scene and was able to recognize the appellant although he had a cap which partially covered his face.

22. While it may be said that **PW1** may have been under panic and pain having been struck on the head, he grabbed and wrestled with the appellant for sometime before the beatings from the other robbers made him let him lose.

23. On the other hand, **PW2 and PW3** were not under any panic. They shone their torches on the appellant whom they said they recognized as one of the attackers. This Court is of the view that the conditions of identification were not so difficult as to fault or doubt the recognition of the appellant by the 3 witnesses. It should be recalled that the 3 witnesses knew the appellant well before the incident as they were neighbours. Accordingly, identification was properly and sufficiently proved.

24. The appellant complained that there was contradictions in the evidence of the prosecution witnesses. The Court notes that while the complainant talked of the presence of **PW2** and another woman, **PW2** could not remember the presence of a woman. He only remembered his 3 brothers.

25. To my mind, that contradiction and inconsistency was not material, substantial or fundamental. It did not go to the heart of the matter. It is possible for two witnesses to be at the same place at the same time but perceive an incident differently.

26. In **Richard Munene v. Republic [2018] eKLR,** the Court of appeal held:-

> ***"Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.***
>
> ***It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it".***

27. The other complaint was that the trial Court did not consider the appellant's defence. In its judgment, the trial Court was of the view that the defence was but an afterthought. That the appellant did not produce evidence to prove that the charge against him was being framed.

28. This Court has on its part analyzed the defence. The appellant did not state from which brother of the complainant he had purchased some land, when he purchased the alleged land and the size. Further, it was not clear why **PW3** with whom the appellant did not allege any grudge will join hands with the complainant's family to fix him. I also reject that ground.

29. On the complaint that nothing was recovered from the appellant, there was evidence that after the incident, the appellant disappeared for nearly a month. It was only after 30 days that he was sighted and arrested. It is not expected that after such a long period the items could be recovered, leave alone the weapon that was used to assault the complainant. Their non-recovery and non-production did not, in my view, weaken the prosecution case.

30. On sentence, on the authority of the Muruwatetu case, I set aside the death sentence and call upon the accused to mitigation.

31. In the end, I find the appeal to be without merit and I dismiss the same.

DATED and **DELIVERED** at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE