REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.18 & 19 OF 2017

JOSEPH MWANGI NJERI.....1ST APPELLANT

JOYCE WAITHERA RUCUIGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Juma SPM delivered on 9th December 2014 in Kibera CM Cr. Case No. 3004 of 2013)

JUDGMENT

The two Appellants were jointly charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. The particulars of the offence were that on the 2nd day of October 2013, along Kaptagat road, Loresho in Nairobi County, jointly with others not before court, the Appellants attempted to rob Samuel Mungai Babu of motor vehicle registration number KBM 425C Toyota Probox white in colour valued at Ksh.500,000/-, the property of Thomas Machangi and immediately before such robbery used actual violence by strangling him with a rope. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged and sentenced to death. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions for appeal, the 1st and 2nd Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They took issue with the trial court's finding that there was sufficient evidence to sustain a conviction. They faulted the trial court for failing to find that there was no evidence to establish the ingredients of the charge. They complained that the trial court violated their constitutional rights to a fair trial. They asserted that the evidence adduced was at variance with the charge and was further contradictory. They faulted the trial court for upholding prosecution witnesses' testimonies which was not credible while disregarding the Appellants' evidence. They were aggrieved that the trial court failed to find that the Appellant's identification was unsafe. They asserted that the prosecution failed to call material witnesses who would have exonerated the Appellants. They were further aggrieved that the trial court failed to appreciate that the exhibits tendered by the prosecution were not of any evidentiary value. Finally, they took issue with their conviction stating that the prosecution had not proved their case to the required standard of proof beyond any reasonable doubt.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. During the hearing of the Appeal, counsel for the Appellants stated that key witnesses who were involved in the Appellants' arrest were not called to testify during the hearing of the case. He argued that the identification was ineffective as no identification parade was held. In addition, the investigating officer said that the Appellants were picked out by the complainant while they were in the cells. He averred that no description of the assailants was given by the complainant in the first report that he made to the police. He submitted there was no evidence that the motor vehicle had stopped 200 meters from a police post and the occupants fled. The police officers who followed them were not able to apprehend them. Members of the public arrested the 1st Appellant and took him to the police station. The 2nd Appellant was arrested by security guards.

Learned counsel argued that the chain of events that led to the arrest was broken since none of the people involved in the arrest testified in court. He asserted that the inconsistences of the prosecution witnesses' testimonies raised doubt on the prosecution's case. He submitted that the motor vehicle purported to have been stolen as well as the logbook of the said vehicle were not produced into evidence. He averred that no P3 form was produced in court to prove the injuries allegedly sustained by the complainant. He was of the view that the evidence adduced did not support particulars of the charge. He stated that the alleged robbery occurred at night hence there was insufficient light for a positive identification to be made. He urged the court to allow the appeal as it was clearly a case of mistaken identity.

Ms. Aluda for the State did not oppose the Appeal. She made oral submissions to the effect that the evidence adduced by the prosecution was not sufficient to sustain a conviction. She asserted that the circumstances surrounding the identification were not clear. In addition, no identification parade was conducted. She submitted that the robbery took place at night. The assailants fled the scene. The Appellants were

brought to the police station by members of the public. She stated that none of the persons who apprehended the Appellants were called to court to testify. She submitted that an identification parade ought to have been conducted. Learned State Counsel averred that PW2 failed to establish the ownership of the motor vehicle in question. She was of the view that the prosecution case was not proved to the required standard of proof beyond any reasonable doubt.

The facts of the case according to the prosecution are as follows: PW1, Samuel Mungai Babu, stated that he worked as a taxi driver. He was employed by PW2, Thomas Machangi. On the material day of 2nd October 2013, he reported to work as usual and worked the whole day at the Kangemi stage. At about 6.00 p.m., while at Kangemi stage, three customers, approached him; they were two men and a woman. He stated that they were carrying cushions. They asked him how much he would charge them to ferry them to Loresho Primary School. He told them Ksh.200/-. The said customers then entered the car. One man sat at the co-driver seat while the woman and the other man sat on the back seat. PW1 stated that he then drove towards the direction of Loresho Primary School. On arriving at the said location, he suddenly felt a rope dropped over his face. He grabbed it but was immediately pushed to the back seat by the man who sat at the co-driver seat. The man who pushed him then went over to the driver's seat, took over the car and started driving. He testified that the lady at the back seat tied his legs. The assailants informed him that they needed the vehicle to commit a robbery.

PW1 stated that at some point, the lady at the back seat removed the disguise from his face and he was able to see that they were now at Loresho Police Post. He stated that he immediately grabbed the hand break and the car stopped. The driver and the man seated at the back seat fled the scene. PW1 said that he was involved in a scuffle with the woman but she also managed to escape and fled from the scene. He testified that a police officer from Loresho Police Post arrived and inquired from him what the problem was. He stated that the assailants were chased and two of them were apprehended by the police. He testified that he identified the two assailants when they were brought back to the station. He later recorded his statement. He later sought medical attention at Mane Medical Centre. On cross examination, PW1 stated that the 1st Appellant was the one who threw the rope over his head. He said that it was getting dark when the robbery occurred. The robbery occurred before 7.00 p.m. He testified that he had not met the Appellants prior to the said robbery.

PW2, Cpl. Thomas Njuguna Mutungui, testified that he is an Administration Police Officer based at Kabete Institute. On the material day, at about 6.45 p.m, he got a call from a stranger informing him that his driver had been robbed and that the robbers had been arrested. He had employed PW1 as his driver. He stated that he proceeded to Loresho Police Post where he found his motor vehicle probox registration number KBN 425C parked. He however did not provide any documents to prove ownership of the same. At the station, he found PW1 who was bleeding from his right ear. His voice was also hoarse. Together with a police officer from Loresho Police Post, they proceeded to Spring Valley Police Station where the matter was reported. The said motor vehicle was photographed but PW2 stated that he did not see the photographs to enable him identify the same as of his car. He testified that he did not know the Appellants nor did he witness the robbery.

PW3, PC Vitalis Chaka, stated that on the material day, he was on duty at Loresho Police Post. He heard a car screech to halt at about 7.00 p.m., about 200 meters from the police post. He ran to the scene and found PW1 who informed him he had been kidnapped by robbers, two men and a woman. He told PW1 to go to the police post and report the incident while he went in search of the said robbers. He did not manage to apprehend them. He went back to the police post. He stated that members of the public later brought in the 1st Appellant who was found hiding in a forest. Later, security guards near the Police Post brought in the 2nd Appellant who was found hiding on a tree. The complainant identified both of them as the robbers.

PW4, Dr. George Kungu Mwau, testified that on the material day he examined PW1 who alleged to have been attacked and assaulted. He stated that PW1 had bruises on his neck, his left eye was swollen and bleeding, his left ear was injured and his voice was hoarse from an attempted strangulation. He said that the injuries were caused by a blunt object. The P3 form was produced as *Prosecution Exhibit 2*.

PW5, Kobudore Kipsang, stated that he was on duty on 6th October 2013 at Spring Valley Police Station. He was instructed by the investigating officer, Sgt. Punyu, of Spring Valley Police Station to take photographs of a motor vehicle probox registration number KBM 425C white in colour. He took three photographs of the same. He produced them in court as *Prosecution Exhibit 3*.

PW6, Sgt. Joel Punyu, stated that he was a police officer attached to Loresho Police Post. He was assigned to investigate the alleged attempted robbery. He stated that the complainant identified both Appellants who were in a cell at the time.

When the 1st Appellant was put to his defence, he stated that he was at work on the material day. He was employed as a casual labourer at a construction site. He testified that he left work at around 4.00 p.m. and proceeded to a bus stage to board a matatu. He jumped over and hanged on the door of a moving vehicle. He was arrested and taken to Loresho Police Post and later to Spring Valley Police Station. At the station, a police officer demanded Ksh.100,000/- for his release. He failed to raise the said amount and was charged with the current offence. He stated that the 2nd Appellant was a stranger to him.

In her unsworn statement, the 2nd Appellant stated that she worked at a salon. She left work at 8.00 p.m. on the material day. She had just alighted from a public service vehicle when a police officer told her to sit down. She stated that the officer informed her there was a search being conducted over an incident that had just occurred. She was arrested and taken to the station. At the station, a police officer demanded money for her release. She was unable to raise the money and was later charged with the current offence herein.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charge of attempted robbery with violence contrary to Section 297(2) of the Penal Code to the required standard of proof.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification to secure the conviction of the Appellants. Evidence of a single identifying witness must be examined carefully to ensure that it is water-tight before a conviction is founded

on it. In the case of Kiilu & Another V. Republic [2005] 1 KLR 174 it was held that:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."***

This court has a duty to weigh the evidence of PW1 who is the only identifying witness with greatest care and to satisfy itself that in all circumstances, it is safe to convict on such evidence. PW1 stated that the robbery occurred at about 6.30 p.m. It is not clear from his evidence how long he chatted with the assailants to enable him be positive that he had identified them. He did not state which source of light he used to identify the Appellants. From his testimony, both Appellants were seated at the back seat. He was strangled and pushed to the back of the car. A hood was placed on his head as the assailants drove around. He stated that the 2nd Appellant removed the hood. He immediately grabbed the hand brake and the car stopped. The 1st Appellant ran away. He was involved in a scuffle with the 2nd Appellant but she also managed to get away. This court is not convinced that PW1 positively identified the Appellants from the circumstances explained above. He did not state which source of light he used to identify the Appellants. His state of mind due to the attempted strangulation, coupled with the fact that he had a hood placed on his head, created circumstances that were not conducive for positive identification. This court notes that PW1 did not give any description of his assailants to the police in his first report that he made to the police.

> **From the evidence adduced, it is clear that the Appellants were not arrested at the scene of the crime. The arrest was also not effected following descriptions given by PW1. No description of the Appellants was given to members of the public or the police in the first report made to the police. The court was also not informed of the distance from scene of the robbery to where the Appellants were arrested by members of the public. Failure to call one of the members of the public who effected the arrest to testify means that a link between the Appellants and the commission of the attempted robbery was broken.**

> **There was no evidence given on how members of the public identified the Appellants as the robbers since PW1 did not give description of his assailants. Absence of the testimony of a member of the public who participated in the arrest of the Appellants means that the chain of events from the attempted robbery to the arrest was broken. Doubt was created as to whether the Appellants attacked PW1. In addition, PW1 did not give any description of the assailants to the police.** In the case of **TOROKE vs. REPUBLIC [1987] KLR 204** the court held that;

> ***"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."***

This court also notes that no identification parade was mounted by the police after the Appellants' arrest. PW6 stated that the complainant identified both Appellants who were in a cell at the Police Post at the time. PW1 did not know the Appellants prior to the attempted robbery. His description of the Appellants in his statement was therefore crucial if the Appellants were to be convicted on the sole evidence of identification. As no description of the Appellants was given in the said statement, the subsequent identification at the trial became mere dock identification which the court finds worthless given that no identification parade was held. In addition**, none of the members of the public who participated in the arrest was availed in court to give evidence.** In **Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134,** this Court observed:-

> ***"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."***

> **The court has a duty to examine thoroughly the evidence on identification before confirming a conviction based on the same. The court in the case of Francis Kariuki Njuri & 7 Others -v- Republic, [Criminal Appeal No. 6 of 2007]** held that;

> ***"The law on identification is well settled and this Court has from time to time said that the evidence of identification must be scrutinized carefully 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. The surrounding circumstances must be considered (See R -v- Turnbull, (1976) 63 Cr. App. R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity, or at all. This Court in Mohamed Elibite Hibuya & Another -v- R, (Criminal Appeal No. 22 of 1996), (unreported) held that: - 'It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the suspicious details regarding his features given to any one and particularly to the police at first opportunity'".***

> **In the present appeal, the evidence of PW1 did not reach the threshold of a positive identification as determined above. A member of the public ought to have been availed in court to give evidence as to the circumstances of the arrest of the Appellants. Lack of a description of the Appellants by PW1 in the first report; as well as absence of evidence from an identification parade raise reasonable doubt regarding the evidence of identification.**

> *The appeal was conceded by the prosecution. The Appellants in their defence denied being involved in the robbery. No other evidence was adduced before this court connecting the Appellants to the robbery. In addition, PW2* **failed to establish ownership of the motor vehicle the subject matter of the attempted robber.**

From the aforegoing, the evidence of identification, taken into totality, is not water-tight and free of error to support the conviction of the Appellants.

In the premises therefore this court finds merit in the appeals lodged by the Appellants. The Appeals are hereby allowed. The trial court's conviction for both Appellants is hereby quashed. The sentence is set aside. The Appellants shall be set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY 2019

L. KIMARU

JUDGE