REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 70 OF 2011.

JUSTINE ALI WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Original Conviction and Sentence in Criminal Case No.5250 of 2010 dated 5th April 2011 in the Chief Magistrates Court at Eldoret by Hon A. Onginjo -SPM)

JUDGMENT

1. **Justine Ali Wanyonyi** the Appellant herein was the accused at the Chief Magistrates Court in Eldoret Criminal Case No. 5250 of 2010. He was charged with Robbery with Violence Contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 15th day of August 2010 at Eldoret town in Eldoret West District within Rift Valley Province, the Appellant jointly with others not before the court, robbed Abraham Khisia Omutolia his mobile phone make Samsung V-300, cash Kshs. 4,300/= and Equity bank plate all valued at Kshs. 8,800 and immediately before the time of such robbery, used actual violence to the said Abraham Khisia Omutolia.

2. The Appellant denied the charge and the case proceeded to full hearing and at the end of the trial, the appellant was found guilty, was convicted and sentenced to suffer death. He has now appealed against the whole judgment citing the following supplementary grounds of appeal:

(i) THAT he pleaded not guilty at the initial trial

(ii) THAT the trial magistrate failed in law and in fact by convicting him while directing herself that the complainant knew and identified the suspect without considering that he did not give his names when he reported the matter to the police when his knowledge was still fresh.

(iii) THAT the learned trial magistrate erred in law and fact by convicting him without considering that the prosecution conducted shoddy investigation as they failed to conduct identification parade according to the reported description to ascertain and confirm the alleged identification or identity of the suspect.

(iv) THAT the learned trial magistrate failed in law and fact by convicting him and sentencing him while relying on prosecution case without considering that the prosecution failed to avail essential witnesses especially the one who was with complainant.

(v) THAT the learned trial magistrate failed to in law and fact by convicting him on inconsistent and uncorroborated evidence adduced by the prosecution.

(vi) THAT the trial magistrate failed in law and fact by convicting him while rejecting his defence without giving any cogent reason to its rejection as provided in section 169(1) of the CPC.

(vii) THAT the learned trial magistrate erred in law and fact in failing to pronounce the sentence to be served contrary to section 169(2) of the CPC.

3. A Summary of the evidence on record is as follows:

PW1, Abraham Kisia, the complainant, testified that on 15th August 2010 at around 10.00 p.m. he was in the company of his friend one Peter and that as they were walking home after watching a football match when he was hit by a stone. He fell down and became unconscious after which the attackers then took away his Samsung phone, wallet, bank documents for Equity and Kshs. 4,300/=. The assailants continued beating him and wanted to push him into a ditch behind Naivas shop but he struggled with them, freed himself and started running towards the market while calling the names of the watchmen who were known to him. The complainant claimed that he managed to identify the

Appellant during the incident as he was known to him.

4. The complainant testified that he reported the attack to the Police Station after which he was referred to Moi Teaching and Referral Hospital where he was admitted for 2 days. The police also issued him with a P3 form (PEXB.2). He added that he returned to the market on a Tuesday and saw the Appellant but that when the Appellant saw him with a bandage he escaped and went underground. He confirmed that he knew Appellant as Appellant used to carry luggage at the market. When Appellant resurfaced, he reported to the police and he was arrested.

5. **PW2 Kurken Lokitur Etaban** was a watchman at Eldoret Municipal Market. He testified that on the material day at about 10:00a.m, PW1 came running as he was being pursued by Appellant. He added that at first, he thought it was a fellow guard but the Appellant snatched a whip from him and beat PW1. He stated that he knew Appellant as he used to roam around the market carrying luggage.

6. **PW3 Joel Suter** was the Clinical Officer at Uasin Gishu District Hospital. He confirmed that the Appellant had a cut wound on his forehead, left side of cheek, multiple whip marks on both sides of chest and back, bruises on the left side of palm and right knee.

7. **PW4 P.C Crispus Murikambas** testified that he was on the material day on duty when PW1 came and reported that he had been attacked by about 10 thugs. He added that at the time of the report, PW1 was bleeding from the forehead and had sustained injuries on the left hand and shoulder. He referred him to hospital.

8. When placed on his defence the Appellant elected to make a sworn statement and called no witnesses. He informed the court that on the material day, he was at home attending a funeral and returned on 10th September 2010 only to be arrested on 22nd September 2010 on claims that he had differed with the complainant. He recalled that he had previously differed with PW1 on a day he was carrying luggage when unfortunately, the luggage hit PW1 because he was on the road.

9. In his written submissions, Appellant challenged his identification by the complainant as the attacker in view of the complainant's allegation that he (complainant) was hit by a stone and was hence unconscious at the time of the robbery. He contended that the conditions for a positive identification were not set out by the prosecution. It was the appellant's case that the investigations were conducted in a shoddy manner and that the crucial witnesses were not called to testify.

10. On sentence the appellant argued that following the Supreme Court decision in **Francis Muruatetu & Anor v Republic [2017] eKLR,** the death sentence is unconstitutional and stated that his sentence should be revised.

11. Miss Mumu, learned counsel for the State, opposed the appeal and submitted that all the ingredients of the offence of robbery with violence had been proved by the prosecution. She added that crucial witnesses were called and they confirmed that they knew the Appellant as he a vegetable vendor at the market while PW2 was a guard at the same market.

12. This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence adduced during the trial in order to arrive at its own independent conclusion. The court also has also to bear in mind the fact that it did not see or hear the witnesses and to give an allowance for that. This was the holding in the case of **Okeno vs Republic 1972 EA 32** where it was held:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R,) [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E.A 424."***

13. In the case of **Muthoko & Anor [2008] KLR 297** the Court of Appeal held as follows:

> ***"It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that"***

14. I have considered the evidence on record, the grounds of appeal, the submissions by counsel. The appellants have raised total of 8 grounds of appeal. Upon considering all I have stated above, I find that the main issue of determination in this Appeal is **whether the appellant was identified by the complainant as the person who had attacked him**.

15. The robbery incident is reported to have occurred at about 10.00 p.m. It was obviously dark and according to the evidence adduced by PW1 and Pw2, they never mentioned the source of light they used to identify the Appellant. It was the evidence of PW1 that the Appellant was well known to him as he used to carry luggage in the market. PW2 also claimed that he used to see Appellant in the market carrying luggage.

16. In the case of **Cleophas Otieno Wamunga vs. Republic CA No. 20 of 1989** in Kisumu the Court of Appeal stated as follows:-

> ***"We now turn to the more troublesome part of this appeal namely the Appellant's conviction on counts 1 and 2 charging him with the robbery. Indakwa (PW1) and Lilian Adhiambo Waguda (PW2). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. What we have to decide now is whether the evidence was reliable and free from possibility of error as to find a secure basis for the conviction of the Appellant. Evidence of visual identification in***

criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification. The way to approach the evidence of visual identification was successfully stated by Lord Midgery. CJ. in the well-known case of Republic vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said;

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

17. Applying the principle in the above cases to the instant case, I find that it is clear that the evidence of recognition should equally be treated with caution. Considering the evidence of the two identifying witnesses, PW1 and PW2, I find that their evidence is devoid of necessary detail that could vividly demonstrate the basis of their allegation that they saw and recognized the Appellant during the robbery. Both witnesses did not describe the light that enabled them to recognize the Appellant as the person who attacked PW1.

18. Miss Mumu, for the state, submitted that there was enough security light at the scene where PW1 was attacked but on looking at the proceedings before the trial court, I note that PW1 and PW2 did not mention anything to do with security lights**.**

19. I further find that the circumstances under which the prosecution witnesses claim that they identified the appellant were not favourable for positive identification. The Appellant's conviction is solely based on the identification by the two witnesses. For the above reasons, I find that the conviction is unsafe and I therefore allow the appeal, quash the conviction and set aside the sentence. I direct that the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly

Dated, signed at Nairobi this 18th day of January 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019.

H. A. OMONDI

JUDGE

In the presence of:

Ms Mumu for the state

Appellant present in person

Court Assistant – Towett