REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.95 OF 2017

RONALD ODHIAMBO ODINYO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. A. R. Kithinji PM

delivered on 11th August 2016 in Makadara CM Cr. Case No. 5598 of 2011)

JUDGMENT

The Appellant Ronald Odhiambo Ondinyo was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 23rd of November, 2013 at Park Road, Starehe within Nairobi County, jointly with another before court and others not before court, while armed with offensive weapons namely knives and sword robbed William Gichuki Gathoni of one mobile phone make Nokia X-1 valued at Ksh.5,900/- and cash Ksh.600/- and immediately before and immediately after the time of such robbery threatened to use actual bodily harm against the said William Gichuki Gathoni. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to fourteen (14) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court failed to adhere to provisions of Section 214 of the Criminal Procedure Code in convicting him. He faulted the trial court for violating his constitutional rights under Article 50(2)(j)(k) of the Constitutional of Kenya. He took issue with the trial magistrate's finding that evidence of identification was proved beyond any reasonable doubt. He complained that the trial magistrate did not consider his defence. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. He averred that the prosecution amended the charges after close of prosecution's case which is contrary to provisions of Section 214 of the Criminal Procedure Code. He stated that he was not given the opportunity to take a fresh plea after the charges were amended. He asserted that PW1's purported visual identification was unreliable, unworthy and inconclusive. He submitted that PW1 testified that he was held from behind and therefore could not have seen the robbers. He stated that PW1 failed to describe the type and strength of light that he used to identify the Appellant. He also failed to define the distance from T.S.S petrol station, where he was watching the robbers from, to where the robbers stood. He was of the view that the trial court ought to have determined this distance so as to gauge whether in such distance it was plausible for a positive identification to be made.

The Appellant averred that PW1 said that he had stopped outside a club called Super Mambo and told a man who was selling chapati that he had been robbed. He submitted that PW1 failed to call this man as a witness yet he is the person who received the first report. The Appellant stated that the complainant never described his assailants to the police when he went to report the matter to the police. His testimony was that the attire the Appellant wore in court was the same attire he wore on the material night. The Appellant asserted that for reliable identification, the witness ought to have given a description of his assailant and confirm the same in an identification parade. He faulted the trial magistrate for holding that the Appellant was positively identified by way of recognition yet PW1 failed to describe his assailants to the police. He asserted that the prosecution relied on dock identification without a description being given in the first report made to the police.

Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the prosecution had established its case on

the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the prosecution relied on a case of recognition. She stated that PW1 testified that he saw four men and one woman walking towards him. The Appellant was among the said men. She averred that PW1 said that the Appellant held his neck and interrogated him as they walked. Learned state counsel submitted that the complainant testified that he was threatened. The assailants had a knife. She asserted the identification of the Appellant was positive because the road was well lit with street lights. She argued that PW1 was able to point out the Appellant in the hotel when he accompanied the police officers to arrest the Appellant. She averred that PW1 was able to identify the Appellant since he had a scar on his throat. Learned State Counsel was of the view that there was no need for an identification parade to be held since the Appellant was arrested a few hours after the robbery occurred. She submitted that the court has discretion to allow amendment of a charge and that the same did not prejudice the Appellant's case.

The facts of the case according to the prosecution are as follows. On 23rd November 2013, at around 9.00pm, PW1 (William Gichuki Gathoni) had just left Blue Hut Hotel and was walking along Park road. He saw a group of people ahead of him, one woman and four men. He stated that there was light. As he walked past them, PW1 said that he suddenly felt someone hold his neck. It was his testimony that the said person was the Appellant. He stated that the Appellant identified himself as a police officer and asked him to identify himself. They walked for about 30 meters as the Appellant interrogated him, while the other four people walked around him. The complainant stated that he believed they were police officers. Suddenly, they insulted him and asked him if he was going to cooperate with them or not. At this point, he felt something cold being pressed on his waist by the Appellant, while one of the other assailants produced a knife. The complainant stated that he raised his hands and said that he was willing to cooperate.

The complainant testified that he had a phone (Nokia X1) and Ksh.600 which the Appellant took from his pockets. He was then ordered to walk and not look back, which he did, because they threatened to shoot him. He walked up to T.S.S petrol station. PW1 said that at this point he saw someone else join the assailants. He then walked to a hotel called Super Mambo and informed a guy who was selling chapati there that he had been robbed. He said that he then saw the five assailants pass by and enter the hotel. PW1 testified that he rushed to Pangani police station which is about 70 meters. He reported the robbery and immediately proceeded to the said hotel with police officers. He informed the police officers that he was able to identify the assailants. He testified in court that the Appellant was wearing jeans and sport shoes and that he had a scar on his throat. This court notes that this description was however not given in the first report made to the police.

When PW1 and the police officers arrived at the hotel, the Appellant was seated outside the hotel with another person while the other four assailants were standing nearby. The four assailants walked away on seeing the police officers. PW1 pointed out the Appellant who was still seated as the police officers entered the hotel. This was at about 10.00p.m. The Appellant was arrested and taken to Pangani police station. PW1 said that the Appellant tried to escape but he was re-arrested. On cross-examination, PW1 said that he did not mention the Appellant's scar in his statement. He admitted that he did not describe the Appellant to the police officers when he reported the robbery.

PW2, PC Julius Musili, stated that he was on duty at Pangani police station on the material night, together with another police officer, Francis Murange (deceased). PW1 came to the station and reported that he had been robbed by a group of five people, consisting of four men and one woman. PW1 stated that they took Ksh.600 and a phone from his pockets. He also said that he was able to identify the assailants. PW2 testified that together with the other police officer, they went to a hotel and arrested the Appellant who was pointed out by PW1. They took the Appellant to the police station. On the way he tried to escape, but was re-arrested. He stated that nothing was recovered from the Appellant. On cross examination, PW2 admitted that PW1 did not give a description of his assailants in the first report that he made to the police.

When the Appellant was put on his defence, he testified that on the material day he went to work as usual and left at about 5.00p.m. He worked as a tailor in Ngara. On his way home, he decided to stop by Super Mambo hotel where he had dinner as he watched a football game. He then left the hotel and started walking home. He stated that on his way home, near a vegetable kiosk, he met two men who searched him and asked him to identify himself. They told him that he was not supposed to be out at that time. They then took him to Pangani police station. He stated that after three days he was charged with the offence of robbery with violence.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and is therefore required to give due regard in that respect (See Njoroge vs Republic [1987] KLR 19). In the present appeal, the issue for determination is whether the prosecution proved its case on the charge brought against the Appellant of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

This court notes that, the trial court in its judgment, and Learned State Counsel in her submissions, made reference to the principle of identification by recognition in securing a conviction against the Appellant. The trial court in its judgment at page 2 stated that;

> **"Despite the fact that an identification parade was not conducted, the accused had been properly identified at the scene of the crime, and that the mode of identification was by way of recognition, which is more reliable than the ordinary identification of a stranger."**

It's however the view of this court that in the present case, the evidence adduced pointed to identification of a stranger and not recognition. The difference between the two forms of identification brought out in the case of *Anjononi & Others vs Republic [1976-80] 1 KLR 1566*. The court held thus:

> **"…Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported)."**

Therefore for recognition to apply, the witness ought to have prior personal knowledge of assailant. In the present case PW1 testified that he had never met the Appellant prior to the alleged robbery. He stated that it was the first time he had seen the Appellant on the material night. His testimony should therefore be evaluated on the basis of identification of a stranger by a single witness and not recognition.

This Court has a duty to weigh the evidence of PW1 who is the only identifying witness with such greatest care in order to satisfy itself that in all circumstances, it is safe to convict on such evidence. This is premised on the settled principle in law that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs. Republic [1989] KLR 426** stated as hereunder: -

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

The evidence in the trial court was by a single identifying witness. 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 -vs- 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."***

PW1 testified that **he saw a group of people ahead of him as he was walking home. The group consisted of one woman and four men. As he walked past them, he suddenly felt someone hold his neck. He stated that the said person was the Appellant. He stated that there was a street light. However, he does not explain how he was able to identify the Appellant since he was being held from behind, after he had already walked past them.** ***Did he face the Appellant at any point?*** **It is not clear from his evidence. He then adds that he was told to walk away and not look back. He complied with the directive. From this evidence it was not possible for this court to assess from what position he was able to identify and memorize facial features of the robbers, particularly the Appellant. PW1 stated that he walked upto the nearby T.S.S petrol station. He then saw someone join the assailants. The court was not informed of the distance between the said petrol station and where the assailants allegedly stood so as to confirm that the same was plausible for positive identification. The court was also not informed if there was sufficient light, if at all, at the said petrol station.**

PW1 stated that he stopped outside a club called Super Mambo and told a guy who was selling chapati that he had been robbed. When he reported the matter to Pangani police station, he did not give a description of the assailants to the police in the first report. PW1 gave a description of the Appellant in court while giving his testimony. He stated that he thought that the attire the Appellant was wearing in court was the one he had on at time of robbery. He told the court that the Appellant had a scar on his throat which he identified in court. PW1 had not indicated earlier in his statement to the police that the Appellant had a scar, a fact he admitted to on cross examination. The identification of the said mark in court amounts to dock identification. No identification parade was conducted by the police. In **Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134,** the 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."**

In the circumstances of this case, this court is of the view that the conviction of the Appellant cannot be sustained on the basis of the evidence of identification of a sole identifying witness. Reasonable doubt has been raised regarding the evidence of identification. The Appellant in his defence, denied being involved in the robbery. No other evidence was adduced by the prosecution to corroborate the evidence of identification to connect the Appellant to the robbery. PW2 in his testimony stated that none of the robbed items were recovered from the Appellant's possession. The court in **Anjononi & Others vs Republic** ***[1976-80] 1 KLR 1566*** held that*:*

> **"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused."**

From the above reasons, the evidence of identification, taken into totality is not water-tight and free of error to support the conviction of the Appellant. The Appellant may well be a victim of mistaken identity. The amendment of the charge sheet to remove section 295 was not prejudicial to the Appellant's case as the same did not introduce any new charge or new particulars.

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

DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2019

L. KIMARU

JUDGE