



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 103 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. B.M. Ochoi –PM delivered*

*on 12<sup>th</sup> October 2017 in Kibera CMC. CR. Case No.4026 of 2013)*

**VICTOR MUYONGA LUKEYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant Victor Muyonga Lukeiyo was charged with two (2) counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence in the first count were that on 19<sup>th</sup> October 2013, at Kware Estate in Ongata Rongai within Kajiado county, jointly with others not before court, while armed with dangerous weapon namely homemade gun, robbed Alloise Juma Ndede of two mobile phones make Samsung and four Mi phones all valued at Ksh.20,000/-, and cash Ksh.4,000/-, and immediately before the time of the robbery wounded the said Alloise Juma Ndede. The particulars of the offence in the second count were that on 19<sup>th</sup> October 2013, at Kware Estate in Ongata Rongai within Kajiado county, jointly with others not before court, while armed with dangerous weapon namely homemade gun, robbed Geoffrey Migosi Ombare one mobile phone make Alcatel valued at Ksh.8,000/-, and immediately before the time of the robbery threatened to injure the said Geoffrey Migosi Ombare.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged on both counts and sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court in convicting him, relied on the evidence of identification which was not free from error. He took issue with the trial magistrate's decision to convict him, yet the evidence surrounding his arrest was unclear. He complained that the trial court failed to appreciate the fact that the most crucial witnesses did not testify in the case. He asserted that his conviction was based on defective and duplex charges. He faulted the trial magistrate for conducting an unfair trial which contravened the bill of rights as provided in the Constitution of Kenya, 2010. 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. Ms. Akunja 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 averred that the Appellant, in the company of two others, robbed the complainants. PW1 (Geoffrey Migosi Obare) had escorted PW2 (Alloys Juma) to his house. As they waited for the gate to be opened, three men emerged from the dark and pointed a gun at them. She submitted that a metal bar was used to injure PW2. She argued that the Appellant fired the gun to scare away neighbours. However, the neighbours chased the assailants and apprehended the Appellant. Learned State Counsel averred that there was light from the motor vehicle which made it possible to identify the Appellant. She asserted that PW1 and PW2 did not lose sight of the Appellant when they gave chase. A toy gun was recovered from Appellant. She was of the view that ingredients of the charge were established. She submitted that the defects in the charge sheet were curable.

The facts of the case according to the prosecution are as follows. PW1, Geoffrey Migosi Obare, stated that on 19<sup>th</sup> October 2013, he had travelled to Eldoret with Alloys Juma (PW2) and Steve Maranga. They came back in the evening and together with PW2, proceeded to Ongata Rongai at around 10.30pm. He stated that he escorted PW2 to his residence near AIC Kware. As they waited for PW2's wife to open the gate, three young men emerged from the dark. At this point, PW2 was standing at the gate while he was in the car. He said that two of the said men came towards him while the other went towards PW2. The two men pointed a gun at him and demanded he surrenders his phone and case. He gave them his phone, make Alcatel, plus Ksh.5,000/-. At this point, he heard PW2 scream and saw him lying on the ground.

PW2's wife opened the gate. He then heard gunshots. PW2 woke up and started running away. One of the assailants ran after him.

He testified that he then opened his door and came out of the vehicle. One of the assailants tried to hit him with a gun but he got hold of the gun and a fight ensued between them. He stated that he managed to get the gun from the assailants. Due to the commotion, neighbours came to their rescue. The two remaining assailants started running away but one of them was apprehended by the neighbours. Administration police arrived soon thereafter. PW2 testified that the gun he managed to retrieve from the assailants was an imitation and not a real gun. The same was produced in court. PW2 came back to the robbery scene. They afterwards went to Ongata Rongai police station to report the incident. PW1 stated that the assailant who was arrested was the Appellant, and that he was the one who had the toy gun. He asserted that there were security lights at the gate and his car lights had been switched on. He stated that since he had struggled with the Appellant for around five minutes before retrieving the gun from him, he was able to identify him.

PW2, Alloys Juma, testified that on the material night, he had just arrived at his home in Kware Rongai at around 10.30p.m. He was accompanied by PW1. They had travelled to Eldoret earlier that day. On arrival, they found the gate locked. He called his wife to open the gate. As they waited for his wife to open the gate, he got out of the car and started removing his luggage from the boot of the car. PW1 remained in the car. He stated that three men suddenly appeared and one of them hit him with a metallic object on the back of his hand. He fell down. The assailant then asked him to raise his hands and surrender his phone. He surrendered two phones make Forme and Samsung 3350, his wallet which contained Ksh.4000/-, ATM card and identity card. His wife did not manage to get the gate keys and when she came to inform him, she peeped through an opening on the gate and saw him lying on the ground. She ran back screaming and pressed the alarm which alerted the neighbours.

One of the assailants shot in the air to scare the neighbours away. PW2 testified that the assailant who was with him ran away and left. The other two assailants were fighting with PW1 who was holding on to something which he later realized was a toy gun. When the two assailants saw the neighbours approaching, they started running away. The neighbours managed to apprehend one of them. A police officer arrived and rescued the assailant from the crowd. PW1 and PW2 proceeded to Ongata Rongai police station and reported the matter. They told the officers that the robber was still at the scene. They went with the officers to the scene. The Appellant was arrested. He stated that he sought medical treatment the next day at Gallants Hospital. PW2 testified that there were security lights at the gate. He stated that the Appellant was the one who accosted him and that he was the one who had the toy gun. On cross examination, PW2 stated that the Appellant hit him with a metallic item. He said that the Appellant went to help his accomplices after he hit him. He stated that the Appellant and PW1 had a scuffle as he tried to retrieve the toy gun. The Appellant fled when he saw the neighbours. He left the toy gun with PW1.

PW3, Corporal Musa Chepkuk, testified that he was on duty on the material day at Ongata Rongai police station. He stated that PW1 came to the station and reported he had been escorting his friend to Kware area in motor vehicle registration number KAY 697U. After they arrived at the gate, three people emerged and robbed them of Ksh.4000/-, an Alcatel phone, a Samsung phone, and a Forme phone. PW1 said that they struggled with the assailants who ran away after neighbours went to their rescue. However, one of the robbers was apprehended by members of the public. When PW3 got to the scene with another police officer (who was deceased at the time of the trial), they arrested the Appellant and took him to hospital since he was badly injured. They afterwards took him to the police station and charged him. A toy gun was also recovered.

When the Appellant was put to his defence, he testified that on the material day he went to work in the morning and left for his residence in the evening. He worked as a *boda boda* operator in Karen but lived in Ongata Rongai. On his way home he met group of people armed with pangas and runguns. They stopped him and asked him for his identity card. Before he could give it to them they pounced on him, took his cash and phone and started beating him up. He stated that a police officer then emerged and fired into the air to disperse the crowd. A police Landover arrived from Rongai Police Station. He was taken to the station and charged.

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 charges 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 has carefully re-evaluated the evidence adduced before the trial court as well as the Appellant's defence. The court has also considered grounds of appeal and written submissions made by the Appellant, as well as oral submissions made by Ms. Akunja for the State. It was evident from the facts of the case that the prosecution relied on direct evidence of identification and arrest of the Appellant to secure the conviction of the Appellant. From the evidence adduced, it is clear that the Appellant was not arrested at the scene of the crime. The arrest was also not effected following descriptions given by PW1 and PW2. No description of the Appellant was given to members of the public or the police in the first report. The court was not informed as to the distance from scene of the robbery to where the Appellant was arrested by members of the public.

This court also notes that the evidence adduced by PW1 and PW2 is contradictory. PW2 testified that after he heard gunshots, PW1 woke up and started running away. He also stated that one of the assailants ran after PW1. On the other hand PW1 stated that one of the assailants shot in the air. The robber who was with him ran away, while the other two robbers engaged in a scuffle with PW1. The said two robbers started running away after members of the public approached the scene. He testified that members of the public started running after the two robbers. PW2 stated that he participated in the chase with the members of the public, and that he did not lose sight of the robbers until the Appellant was arrested. *So was PW2 on the scene or did he run away? How was he able to participate in the chase if he had run away from the scene?* According to PW1, PW2 ran away from the scene and one of the robbers ran after him. This court is therefore not convinced that PW2 took part in the chase as alleged and the evidence that he had not lost sight of the Appellant until his arrest is not credible. This evidence is tainted by the mentioned contradictions. This court will therefore assume that the Appellant was arrested by the members of the public and that PW1 and PW2 were not part of the chase.

Failure to call one of the members of the public who effected the arrest to testify means that a link between the Appellant and the commission of the robbery was broken. There was no evidence given as to how members of the public identified the Appellant since PW1

and PW2 and did not give description of their assailants. Absence of the testimony of a member of the public who participated in the arrest of the Appellant means that the chain of events from the robbery to the arrest was broken and doubt was created as to whether the Appellant was among the gang which attacked PW1 and PW2. In addition, PW1 and PW2 did not give any description of the assailants to the police in their first report. Furthermore, none of the items that were robbed from the complainant was recovered in the Appellant's possession.

It was PW1's testimony that three men attacked them. Two of them approached him while one went towards PW2. He stated that the Appellant was one of the two robbers who approached him. He was the one carrying the toy gun. On the other hand PW2 also claimed that the Appellant was the one who attacked him. He stated on cross examination that the Appellant is the one who attacked him with a metallic object and that he was the one who had the toy gun. From their testimonies, it is clear that the two could not have been attacked by the same person. Two of the robbers attacked PW1 while the third attacked PW2. So how can they both claim that the Appellant is the one who attacked them? PW2 in his evidence in chief had stated that:

***“The person who was holding me meanwhile left me and started running away. The other two thugs were still struggling with Obare to remove him from the car, Geoffrey had gotten hold of one of the robbers tightly and refused to let go, they were \_\_\_\_\_ to a gadget which Geoffrey thought was a gun...”***

This contradicts his evidence on cross examination. It is evident from their testimonies, that PW1 and PW2 could not have both been attacked by the same person. They can therefore not each claim that they were attacked by the Appellant. If the Appellant participated in the robbery as claimed, he could only have attacked one of them. The toy gun produced in court was not found in the Appellant's possession. It was in the possession of PW1 who stated that he had retrieved it from one of the robbers. When the Appellant was arrested none of the stolen items was recovered from him.

The evidence of PW1 and PW2 on identification of the Appellant is not any different from dock identification. They did not give a description of the Appellant to the members of the public or the police officers in their first report. None of the members of the public who participated in the arrest was availed in court to give evidence. Once the Appellant was arrested by members of the public, he ought to have been taken to the nearest police station where a proper identification parade should have been mounted. Dock identification is deemed worthless in the absence of an identification parade. When the Appellant was arrested by the members of the public, it was natural for PW1 and PW2 to agree with the members of the public that he was one of the robbers, otherwise *why was he apprehended?* The court in the case of **Kamau vs Republic [1975] EA 139** held that:

***“The most honest of witnesses can be mistaken when it comes to identification.”***

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 and PW2 did not reach the threshold of a positive identification as discussed above. It is this court's view that the testimony from a member of the public would have reinforced that of PW1 and PW2 on identification of the Appellant.

From the above arguments, the evidence of identification, taken into totality, was not water-tight and free of error to support the conviction of the Appellant. The Appellant may well be a victim of mistaken identity.

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 and sentence on both counts is hereby set aside. The Appellant is ordered released forthwith from prison and set at liberty unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**L. KIMARU**

**JUDGE**