REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NUMBER 335 OF 2008

PETER MURAGURI WAMONYE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

Appeal from original conviction and sentence in Mukurweini Principal Magistrates' Court Criminal Case No. 114 of 2007 (Hon. Kombo, SRM) on 17th December, 2008)

JUDGMENT

The appellant was convicted by the lower court of two counts of robbery with violence contrary to **section 296(2) of the Penal Code, cap. 63, Laws of Kenya** and being in possession of bhang contrary to **section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. In the former count, it was alleged that on 4th day of January, 2007 at Mihiti village in Nyeri district within central province, jointly with others not before court, he robbed Geoffrey Wangondu of cell phone Nokia 2300 worth Kshs.5200/= and Kshs. 600 cash, all valued at Kshs. 5800 and at or immediately before or immediately after the time of such robbery they beat the said Geoffrey Wangondu. The particulars of the latter count were that on the 13th day of February, 2007 at Gikondi village in Nyeri district within central province the appellant was found in possession of 5 rolls of bhang which was not in the form of medicinal preparation.

He was sentenced to death in respect of the 1st count and 2 years imprisonment on the 2nd count. He has now appealed to this honourable court against both the convictions and sentence. In the supplementary grounds of appeal filed on his behalf by his counsel on 1st November 2018 he faulted the learned magistrate for erring in law in finding that the appellant was properly identified by the 1st prosecution witness whereas the conditions were not conducive for a proper and positive identification; in the same breath, the learned magistrate was faulted for holding that the 2nd and the 3rd prosecution witnesses properly identified the appellant. Again, the decision of the learned magistrate was impeached on the ground that he erred in law and in fact in the manner he treated the evidence that was omitted from the occurrence book. The appellant also complained that he was convicted based on the evidence of the 1st prosecution witness yet his evidence was not corroborated; the magistrate did not warn himself of the dangers of convicting without any corroborating evidence; finally, the learned magistrate is said to have erred in law in holding that the only sentence that could be meted out was the mandatory death sentence.

The background of the prosecution case was this: on 4th January, 2007 at about 10 P.M., the complainant (PW1) was on his way home from Mihuti trading centre where he had just parked his matatu when he was confronted by three men. They flashed their torches on his face and ordered him to sit down. One of them hit him with the side of a panga when he hesitated. They ransacked his pockets and took his Kshs. 600 and a Nokia phone. While seated he was able to recognise the appellant as the person who ransacked his pockets.

His assailants then subjected him to kicks and blows before ordering him to accompany them back to the trading center. They again told him to lie down at which point the appellant removed his belt and used it tie the complainant's hands from the back. They then led the complainant into some thicket; as they walked through this thicket, they ordered the complainant never to look back.

After a few hours' walk one of the assailants asked him to take them to Wanjohi Waritho's home; the complainant agreed because he knew Waritho as a fellow matatu driver. They also asked whether he knew the owner of motor vehicle whose registration they only gave as "No. KZJ"; the complainant responded in the affirmative. Since Wanjohi's home is next to an administration police camp, the complainant hoped that once there he would raise alarm and possibly escape. However, as they approached the camp the appellant suggested that they use a different route because he feared that he was likely to escape.

Later, one of the men suggested that they should leave the complainant alone and return his property. The appellant then came in front of him and dropped the Kshs. 600 and the phone on the ground. One of the men untied him but as he picked his money and phone, the appellant hit him with the side of the sword he was armed with and demanded to know who had given him permission to pick the money and the phone.

His hands were tied again and they all headed back to where they had come from. In the meantime, the assailants started quarreling amongst themselves and complained that the appellant had brought them to a residence of paupers. At about 2:30 AM the complainant asked them to

take him to his home where he had more money to give them. They agreed but still they continued assaulting the complainant even as he led them to his home. As they approached the home, the appellant warned them that the complainant had a brother who could easily subdue them.

While they were about 150 metres from the complainant's home, the complainant struggled to free himself. They noticed and one of the assailants attempted to strike him with an axe; somehow, he managed to block the blow. At this point, they told him to say his last prayers. Sensing danger, the complainant decided to fight back. It is at that time that they panicked and ran away. The complainant raised alarm and his fellow villagers came to his rescue. He told them that he had been attacked by the appellant and two other people.

They pursued the assailants but could not get them because they disappeared in a coffee plantation. One of the villagers called the police from Mukurweini police station. At about 5 AM the complainant went to hospital for treatment. He then went to the appellant's home in the company of police officers but they could not find him. It is only after a month that someone called and informed them that the appellant was at Gikondi. The complainant went there accompanied by police officers who apprehended him. He also testified that he had given the appellant's name as one of the attackers when he recorded his statement with the police.

Lawrence Wachira Kabuthi (PW2) and **John Macharia (PW3)** were amongst the complainant's neighbours who responded to his distress call. They were both asleep when they were woken from sleep at about 3 A.M. **Kabuthi (PW2)** also screamed to attract the attention of other neighbours. As a matter of fact, **Macharia (PW3)** was alarmed by his screams; he went to his residence before they walked to where the complainant was. They found him and noted the injuries on his knees and face.

The complainant told them of the attack and in particular informed them that one of the people who attacked him was the appellant. They all knew the appellant since they lived in the same neighbourhood.

They pursued the assailants together with the rest of the neighbours; according to Macharia (PW3) he was able to recognise the appellant in the process since there was some moonlight; however, they were unable to catch him or any of the other attackers.

Dr Murage Mbugua (PW5) produced a medical examination report showing that indeed the complainant sustained injuries on the back, arms on the knee and the left leg. He also confirmed that the complainant was examined a few hours after he sustained the injuiries.

According to the complainant, **Kabuthi (PW2), Macharia (PW3)** and the investigations officer, **Police Constable Joseph Kamau (PW6),** the appellant was arrested much later at a place called Gikondi where he had been employed as a domestic servant. Previously, attempts to trace him at his home had failed and it is only after the officers got a tip off that he was at Gikondi that they proceeded there together with the complainant and arrested him. The investigation officer testified that apart from arresting the appellant, he was among the officers who went to the scene immediately the robbery was reported to the police. It is at that time that the complainant informed him that the appellant was one of his attackers. The officer and his colleague, **police constable Muriuki (PW4)** arrested the appellant on 13th February, 2007. It was also their evidence that **constable Kamau (PW6)** recovered five rolls of bhang under the appellant's mattress at the time of his arrest.

As far as the first count is concerned, two major issues which the trial court was concerned with and which this court has to consider whether they were addressed appropriately in the court below are; whether it was proved beyond doubt that the offence or robbery with violence was committed; and, if so, whether it was the appellant who committed the offence. In resolving these questions, it is necessary to consider the evidence in the context of the law applicable and to be precise, the provisions in the Penal Code under which the appellant was charged.

The offence of robbery is defined in section 295 of the Penal Code, Chapter 63 Laws of Kenya but the ingredients of a crime of robbery with violence and the penalty thereof are prescribed under section 296(2) of the Code.

Section 295 of the **Penal Code** states;

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

Section 296(2) of the Code defines when robbery as defined under **section 295** morphs into robbery with violence; it says: -

> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

It follows that in order to convict for the offence of robbery with violence, the prosecution must have proved that the complainant was not only robbed but also that, at the time of the robbery, the accused was armed with any weapon or instrument that may deemed to be dangerous or offensive; or, that the accused was in the company of one or more persons; or, immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The complainant's evidence as to the fact of attack and the circumstances in which he was attack are, in my humble view, uncontroverted. He was not only attacked by three armed men but the same attackers went a step further to rob him of his personal property and injured him in the process. His injuries were certified by a medical doctor who classified them in the medical examination report as "harm". Without having to belabour the point, I am satisfied, as the trial court was, that the prosecution proved beyond reasonable doubt that the offence of robbery with violence as understood in **section 296(2)** of the Code was committed.

The identification of the appellant as the person who perpetrated this crime was the hotly contested issue. I must agree with the learned

counsel for the appellant that the identification of the appellant was more by a single identification witness rather than three witnesses as the learned magistrate held in his judgment. I have come to this conclusion because from what I gather, apart from the complainant, the only other person who claimed to have seen the appellant was Macharia (PW3). But my assessment of Macharia' evidence is that he did not have more than what one would regard as a fleeting glance of the complainant's attackers. It is to be remembered that it was at night when Macharia claims to have seen appellant and although he testified that there was moonlight, it is worth noting he did not have a face to face encounter with the attackers but only saw them flee. In these circumstances, it is possible that he could be mistaken as to the identity of whoever he thought was the appellant.

Although the learned magistrate found as a fact that **Kabuthi (PW2)** saw the appellant as well, this was not the case. Kabuthi himself testified it was Macharia who told him that he had seen the appellant. It is obvious that the learned magistrate misdirected himself on facts as far Kabutha's evidence is concerned.

This then leaves us with the evidence of the complainant himself as the main and the only evidence on the identification of the appellant. It is the evidence of a single identification witness and at this point it is necessary to look at the law on such evidence.

In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

> ***It is trite law that where the only evidence against a defendant is evidence on 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 a conviction.***

On the particular issue of the evidence of a single identification witness, the same court acknowledged in O**geto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows: -

> ***It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.***

The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

> ***A conviction resting entirely on identity invariably causes a degree of uneasiness…***
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> ***That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.***

The court also cited its own decision in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held:

> ***Subject to certain well known exceptions it is trite law that a fact may be proved by the 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 the 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 possibility of error.***

The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness is an issue that was taken up in the Court of Appeal in **Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga versus Republic** where it noted that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. The court proceeded to state further that whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant based on the evidence of the identification.

Again, in **Criminal Appeal No. 24 of 2000 Paul Etole& Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution. It stated as follows;

> ***The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.***
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> ***All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they***

> ***examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant.***

The Court here is candid that failure by the trial court to caution itself against the danger of relying on the evidence of a single identification witness is a serious non-direction on its part.

Turning to the appellant's case, it is apparent that the trial court did not warn itself of the danger of relying on the evidence of a single identification witness obviously because it proceeded on what I have held to be a mistaken presumption that the appellant was recognised by more than one person.

Noting that the court can still convict based on the evidence of a single identification witness, and having had the benefit of examining the evidence and evaluating it afresh as I ought to, I have had to ask myself whether the trial court would have come to a different conclusion had it proceeded on the understanding that the evidence of identification was that of a single identification witness.

The appellant was known to the complainant as they both lived in the same neighbourhood. He testified that he immediately recognised him when the attackers flashed their torches on his face. He had a close encounter with the appellant when the appellant frisked him and took his money and phone. At some stage, during the night the appellant addressed him when the robbers debated whether to release him. The complainant remained in the company of his attackers for more than six hours during which time the attackers conversed and even quarreled amongst themselves.

In these circumstances, the complainant must have certainly recognised the appellant. And I believe it is as a result of this recognition, that he informed his neighbours that one of the people who attacked him was the appellant. This is the same information he gave to the investigation officer when he arrived at the scene a few hours after he escaped from his assailant's custody.

The inevitable conclusion that I am persuaded to come to upon this fresh evaluation of evidence is that, taking all the circumstances into account, the appellant was positively identified; as a matter of law, his was case of positive recognition and not just identification. For this reason, I do not find any merit in the appellant's appeal against his conviction on the first count.

As far as the sentence is concerned, it is now been held that death is not a mandatory sentence in this country. (See the Supreme Court of Kenya decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR).** To the extent that the learned magistrate held that it is a mandatory sentence, I will allow the appeal on sentence only and remit the case back to the trial court for hearing on sentencing of the appellant afresh.

I will allow the appeal against conviction and sentence on the 2nd count because it was not proved that the substance the appellant is alleged to have been found in possession of was cannabis. I say so because the government analyst who examined the substance did not testify and his report was purportedly produced by a police officer. As I have said elsewhere, this kind of conduct is not only irregular and prejudicial to the accused but is also a grave miscarriage of justice. **(See Maina Thiongo v Republic (2017) eKLR; Nyeri High Court Criminal Appeal No. 45 of 2017, Fredrick Gatitu Macharia versus Republic).**

In any event having convicted and sentenced the appellant on the capital offence it was not necessary for the learned trial magistrate to mete out a sentence on the second count; it ought to have been held in abeyance instead. Orders accordingly.

Signed, dated and delivered this 25th day of January, 2019

Ngaah Jairus

JUDGE