REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal Nos 397 & 398 Of 2010

(An Appeal arising out of the conviction and sentence of Hon. M.A. MURAGE – SPM delivered on 14th July 2010 in Limuru SPM. CR. Case No.409 of 2009)

ANTHONY NG'ANG'A WANJIKU...............1ST APPELLANT

BENSON MUNGAI NJENGA........................2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

Anthony Ng'ang'a Wanjiku (1st Appellant) and Benson Mungai Njenga (2nd Appellant) were 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 28th March 2009 at Gatimu Village, Ngecha Location in Kiambu County, the Appellants, jointly with others not before court, while armed with offensive weapons namely pieces of timber and pangas, robbed Anthony Ngige Mbiu of Kshs.5,500/- and a Nokia 5000 phone and at or immediately before or immediately after the time of such robbery, wounded the said Anthony Ngige Mbiu (the complainant). 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. They were sentenced to death. They were aggrieved by their conviction and sentence. They filed separate appeals to this court. Their respective appeals were consolidated. They were heard by a mixed bench which dismissed their appeals. Following the Supreme Court decision of **Republic –vs- Karisa Chengo & 2 Others [2017] eKLR**, the decision of the mixed bench was set aside. The appeals are being heard afresh by the High Court, which is the court with jurisdiction to hear the same.

The Appellants raised more or less similar grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification that was made in difficult circumstances. The Appellants were of the view that the conditions favouring positive identification were absent and therefore the trial court erred in finding that the prosecution had established its case to the required standard of proof. The Appellants took issue with the trial court's assertion that the Appellants had been recognized by the complainant. The Appellants urged the court to find that there was no basis upon which the trial court could reach such decision. The Appellants were aggrieved that the trial court failed to make a finding that the evidence adduced by the prosecution witnesses was contradictory and conflicting. In particular, they were of the view that the inconsistent nature of the evidence adduced by the identifying witnesses should have led the trial court to reach the finding that they had not been properly identified. They took issue with the fact that the trial court failed to consider the alibi defence and gave no reason for disbelieving the same. In the event that the appeal on conviction was unsuccessful, the Appellants urged the court to re-sentence them pursuant to the Supreme Court decision of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**. In the premises therefore, the Appellant urged the court to allow their respective appeals, quash their conviction and set aside the sentence that was imposed on them.

During the hearing of the appeal, the Appellants presented to court written submission in support of their respective appeals. They further made oral submission in support of their appeals. The 1st Appellant submitted that the prosecution's case was solely based on the complainant's evidence which was to the effect that he had recognized him. The complainant testified that he had identified the 1st Appellant by his voice. The 1st Appellant took issue with this assertion by the complainant. He pointed out that the complainant did not state what words he allegedly uttered that enabled him to be positive that it was the 1st Appellant that he had identified and no one else. The 1st Appellant submitted that the testimony of the complainant and that of PW2 were contradictory in the sense that they were not sure of the number of assailants that accosted and robbed them. He further stated that the complainant on the one hand said that the Appellant was his friend while on the other hand, PW2 his father testified that the Appellant was a known criminal in the area. The 1st Appellant took issue with the particulars stated in the charge sheet, especially the allegation that a panga was used during the robbery. This particular was not

supported by evidence. He urged the court to take into account the entire circumstances of the case including the fact that even though he was a neighbour of the complainant, it took more than three days after the incident for the police to arrest him. He relied on several authorities in support of his submission to the effect that there was no proper identification that would have enabled the trial court to convict him. He urged the court to allow the appeal.

On his part, the 2nd Appellant relied on the first report that was made by the complainant to the police. In that first report, it was clearly indicated that the complainant had been attacked by unknown people. The 2nd Appellant submitted that the first report made to the police was of an assault and not robbery. He wondered how what was stated in the first report later changed to become that the complainant had identified them at the scene of robbery. Just like the 1st Appellant, the 2nd Appellant questioned the credibility of the complainant's testimony that he had identified them at the scene of crime. The 2nd Appellant explained the circumstances of his arrest which had got nothing to do with the alleged robbery incident. The 2nd Appellant cited several authorities in support of his submission that he had not been properly identified. In the premises therefore, the 2nd Appellant urged the court to allow his appeal.

Ms. Atina for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellants with the robbery. While conceding that in the first report made to the police, it was indicated that the complainant had been assaulted by unknown people, she submitted that the said report was made by a relative of the complainant and not by the complainant himself. At that time, the complainant was in hospital having been injured during the robbery incident. She submitted that both Appellants were recognized by the complainant and PW2 in the robbery incident. The Appellants were identified by their voices. They were also identified facially when a passing motor vehicle illuminated the scene of crime. She was of the view that any contradiction and inconsistence apparent in the evidence was minor and did not affect the thrust of the prosecution's case that it was the Appellants who robbed the complainant. She explained that the ingredients required to establish the charge were proved. The complainant lost an eye during the robbery incident. The Appellants' respective defences, which constituted of mere denials, were properly considered by the trial court. She urged the court not to interfere with the verdict of the trial court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> **"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".**

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge 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 that was adduced before the trial court. It has also considered the rival submission, both written and oral, made before this court. It has also taken into account the grounds of appeal put forward by the Appellants. It was clear from the evidence and submission made that the Appellants were convicted on the sole evidence of identification. According to the complainant, on 28th March 2009 at about 9.00 p.m., he alighted at his home in Gatimu Village, Ngecha Location from a motor vehicle that he had boarded in Nairobi. He started walking towards the direction of his home. The complainant was with PW2 Peter Mbiyu Kamau, his father. Both the Appellant and PW2 testified that while on the way, they were accosted and attacked by a group of people. The complainant was hit on his head and injured. His left eye was damaged. The complainant and PW2 testified that, although it was dark, they recognized the Appellants by their voices. This was on account of the fact that they were neighbours of the Appellants. Whereas the complainant testified that the Appellants were his friends and therefore he had no grudge with them, PW2 testified that the Appellants were known bad people in the village. In fact, PW2 testified that the Appellants were known criminals. The complainant testified that he was robbed of his mobile phone make Nokia and Kshs.5,500/-. The phone was not recovered. After the robbery incident, he was rushed to Tigoni Hospital, then to Kijabe Hospital and finally to Kikuyu Hospital where the damaged eye was surgically removed. During the same night, at 10.23 p.m., a report of the attack was made to the police. The report was made by one Martin Githuka Mbiyu, the brother of the complainant. He reported the incident as an assault case. The report as appears in the Occurrence Book was to the effect that the complainant had been assaulted by unknown people while he was walking home from work.

When the Appellants were put to their defence, they denied the allegation that they had committed the offence. They gave an alibi defence. They both testified that on the material night that they were alleged to have robbed the complainant, they were in their respective homes after returning from work. They both narrated how on 1st April 2009 they were arrested by the police while in their respective homes. Their respective houses were searched. Nothing that was robbed from the complainant was recovered. The Appellants disputed the evidence by the complainant that they had been identified at the scene of robbery.

The law regarding how the court should treat the evidence of identification is well settled. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

> **"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-**
>
> **"Subject to 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 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 possibility of error”.

In **Dzombo Mataza –vs- Republic [2014] eKLR**, the Court of Appeal held thus:

> **“These concerns were similarly revisited by this Court differently constituted in the case of Wamunga v Republic (1989) KLR 424. The Court had this to say in the case:-**
>
> **“Evidence of visual identification in criminal cases can bring about miscarriages 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 greater 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 in reliance on the correctness of the identification… 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 a conclusion….”**
>
> **The single thread that runs through all these decisions is the need for the courts to consider the evidence of a single witness on identification under difficult conditions with greatest care and circumspection. However, it should be noted that the cases do not address identification by way of recognition whose considerations are slightly different from identification by a stranger as we shall readily see. However, whether the identifying witness is a stranger to the suspect or is a person known to the witness, it is vital that the witness sees that person first before he can identify or recognize him. In other words, whether a stranger or not there must exist conditions such as presence of light that would aid or enable the witness to identify or recognize the suspect, particularly if the offence is committed during the ungodly hours of the night.””**

In the present appeal, the complainant and PW2 testified that he identified the Appellants by their voices. The complainant testified that the 1st Appellant while in a gang of several people, stopped them claiming that they were police officers. It was not clear from the complainant’s and PW2’s evidence what the prevailing light conditions were. The robbery incident took place at night (9.00 p.m.). The source of light was not indicated. The complainant testified that he was hit on the left side of his head before being robbed of his mobile phone and Kshs.5,000/-. He sustained an injury on his left eye. The injury damaged his left eye. The complainant and PW2 testified that although it was dark, they had identified the Appellants by their voices. In essence, they were saying that they were familiar with the Appellants voices by virtue of previous close interaction with them.

Whereas this court acknowledges that voice identification is admissible in evidence (See **Limbabula –vs- Republic CA Criminal Appeal No.140 of 2003)**, this court was not persuaded by the evidence adduced by the complainant and PW2 that indeed they had recognized the Appellants in the course of the attack. The complainant and PW2 did not tell the court what words the Appellants used that made them reach the conclusion that it was them and no one else. Both witnesses clearly indicated that on account of the prevailing darkness, they did not see their assailants. From their respective testimonies, it was evident that the attack took a short time. This court also noted the contradiction in the evidence of the complainant as compared with that of PW2. Whereas the complainant specifically stated that he was attacked by two men, PW2 testified that they were attacked by seven (7) men. In such confused circumstances, this court doubts that the complainant and PW2 could have identified the Appellants by their voices.

Further, the first report made to the police indicated that the complainant had been attacked by unknown persons. While it is acknowledged that this report was made by a brother of the complainant, it can be inferred that he obtained this information from the complainant and PW2. The first report made to the police becomes significant when PW2 testified that the Appellants were known criminals in the area. That being the case, it is not beyond the realm of conjecture that after the robbery incident, the Appellants having been profiled as criminals, were arrested by the police and charged with the offence. This court holds that the evidence for identification relied on by the prosecution to secure the convictions of the Appellants is tenuous and cannot form a basis for the Appellants’ conviction in the absence of any other evidence to corroborate the same. In the present appeal, there was no other evidence to corroborate the evidence of identification. It may well be the case as stated by the Appellants in their defence that they were elsewhere when the robbery incident took place.

In the premises therefore, this court finds merit with the appeals lodged by the Appellants. Their respective appeals are hereby allowed. Their respective convictions are quashed. They are acquitted of the charge. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is ordered.

DATED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2019

L. KIMARU

JUDGE