REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 111 OF 2016

EVANS INDIAKA CHIVONDO....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 6526 of 2016 Republic vs Evans Indiaka Chivondo in the Chief Magistrates' Court at Eldoret by C. Obulutsa, Chief Magistrate on the 30th day of September 2016]

JUDGMENT

1. The appellant (**EVANS INDIAKA CHIVONDO**) was convicted on a charge of robbery with violence Contrary to **Section 296 (2)** of the **Penal Code** whose particulars were that on 24th November 2015 at **MAJENGO** village, **LUGARI** Sub-county within Kakamega county, jointly with others not before court, while armed with dangerous weapons, namely pangas, rungus and iron bars, robbed **MILTON MULONGO NYONGESA** of 6 mobile phones of assorted make, one spot light, assorted scratch cards and cash Ksh.15,000/= all totaling to the value of Ksh.35,000/- and immediately before the time of such robbery, threatened to use actual violence to the said **MILTON MULONGO NYONGESA.**

The appellant denied the charge, but after trial where 4 witnesses testified, he was convicted and sentenced to death.

2. MILTON NYONGESA MULONGO was a trader within **MAJENGO** village, and on 24.11.2015 at about 3.00 am, he was asleep with his wife **CLAIRE IMINZA** (PW2), when he heard a knock at the door. He woke up and realized that some people who had torches, had already entered the room. One went to him while armed with a panga and ordered him to lie down. PW1 covered himself but stated:

> ***"I covered myself from the opening and their torches. I was able to identify one of them. He had a brown hat. I knew him since he is a boda boda rider and has been carrying me before. He threatened me with a panga as they carried away the keys for the shop."***

3. PW2 screamed and the robbers fled. Upon checking, PW1 realized that the intruders had taken away 6 phones, some scratch cards with 20000/-, torches and cash Ksh.15,000/-.

4. Upon cross examination PW1 stated that three people entered the room and it was the appellant who stood guard over him as the others ransacked the shop. According to him, the others shone their torches on the appellant, this enabling him to identify the latter.

When PW1 reported the matter to police he told them he knew his attacker and pointed out the appellant's house to them and he was arrested. Nothing relating to the robbery was recovered from the appellant's house.

5. PW2 clarified that she had never seen the appellant before the night of the robbery, and that although he wore a hat, it did not cover his face.

6. APC MOSES KIPTUYA (PW3) confirmed that the complainant said he had identified one person during the robbery, and he led them to the appellant's house. At the time of his arrest, he was wearing a muffin over his head.

7. The appellant's sworn defence was that while at his house repairing his motor cycle, a customer called on his phone, and he went to that customer's house. While waiting, police arrived and asked for his muffin and jacket then he was arrested and charged for the offence of robbery.

8. The trial magistrate in his judgment was persuaded that the appellant was properly identified by recognition as he was not a stranger to PW1. Further that the appellant, upon arrest was found with a brown hat, which the complainants had seen him wearing on the night of the incident.

9. The appellant contested these findings on grounds that the evidence on identification was not adequate and raised reasonable doubts and the trial court shifted the burden of proof onto the defence, for no reason.

He canvassed his appeal through the written submissions arguing that this was a case of mistaken identity saying if the victims had been ordered to cover themselves during the incident then it was impossible to see and identify the robbers, as the witness never explained that he opened the covers to look at the robbers.

10. That in any event PW2's evidence seemed to suggest that the person she saw had a hooded jacket, so that what was being referred to as a hat was actually a hood. Further that whereas the two witnesses referred to a brown hat, what was eventually availed as exhibit was a muffin and there was no evidence led to clarify whether this referred to one and the same item.

11. The appellant also pointed out that none of the stolen items were recovered from him so as to link him to the incident, yet police went to his house (unannounced) the next day.

12. In opposing the appeal, **MISS ODUOR** on behalf of the state submitted that the evidence positively placed the appellant at the scene and linked him to the offence, as it was corroborated, consistent and credible. It was her contention that the ingredients of robbery with violence were proved as the appellant was in the company of two or more persons, and they were armed with pangas (being offensive weapons).

13. It was her contention that the evidence on identification was overwhelming and free from error, as it was by recognition, and with the aid of light reflecting from the torches which the attackers had. Counsel pointed out that while the other two ransacked the shop, the appellant stood guard over the victims, and thus gave them the opportunity to see and recognized by PW1 who knew him as a boda boada rider in the area, and this was fortified by appellant's own admission that he was indeed a boda boda rider. That in any event, upon arrest police found him with a muffin.

Miss ODUOR submitted that the defence tendered by the appellant was not water-tight and did not shake the evidence of prosecution witnesses.

14. The crux of this appeal revolves on one major issue i.e identification. It was the trial magistrate's finding that the appellant was adequately identified with the aid of torch lights beaming from the torches the robbers had and the appellant was well known to PW1.

The locus classicus on identification is the case of ***CHARLES O. MATIANYI 1986 eKLR*** which urges courts to take great caution when it comes to identification under difficult conditions. The court must take into account the source of light, the amount of light, the position of the light in relation to the persons being identified, and the person identifying.

From the evidence it is not clear whether the sleeping area and the shop were all within one room or separate. It is also not clear whether even if it was the room, what was the distance between the bed and the shop area where the goods were.

The evidence by PW1 is that it is light from the torches held by the other robbers who were busy ransacking the shop, which beamed onto the appellant, thus enabling him to see and recognize him which part of the appellant's body did the torch light beam. What size were the torches and what was the light intensity.

Whereas PW1 in his evidence stated:

"He had a hat with a jacket." (which would mean a hooded jacket and which would then be partially covering the face of the wearer).

These witnesses never identified the hat in court but later PW3 (the Administrative Police Officer) produced a muffin (which I understand to be a woolen head cover) in court as Exhibit 1. None of the other witnesses identified the muffin to confirm that it was the one the attacker wore on the night in question, instead they were only recalled to identify a stone, purportedly used to break the door on the night of the robbery.

15. In my own evaluation, the opportunity for identification, was not sufficiently established.

Indeed the case of ***TURNBULL V REP 1976*** accordingly recognized that even in broad daylight, one can make a mistake on identity including identity of one's own close relation if the opportunity and circumstances are difficult. I am persuaded that PW1 may have genuinely believed that the person who stood over him in a hat or a hooded jacket was the appellant, but it was a mistake, or at worst the opportunity for identification was not adequate. Nothing related to the robbery was recovered from the appellant whose house was visited the next day. It is on account of this that I hold and find that the conviction was unsafe and it is quashed and sentence is set aside.

16. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY 2019

H. A. OMONDI

JUDGE