



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL 98 OF 2017**

**BETWEEN**

**EVANS NJENGA GITAU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. Cr. Case No. 2239 of 2014 delivered by the Hon. E. Juma, SPM on 15<sup>th</sup> June 2017).*

**JUDGMENT**

**BACKGROUND**

1. The Appellant herein was charged with three counts of robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**. In count I, the particulars were that on the 21<sup>st</sup> of May, 2014 at Gataka Road Area in Ongata Rongai Township within the Kajiado County, jointly with another not before court, being armed with a dangerous weapon namely a pistol and a panga, robbed Francis Gatere Kihu of one television set make flamingo, one radio make sharp, one DVD player make LG and one cell phone make Nokia E61 all items valued at Kshs. 36000/- and at the time of that robbery threatened to use actual force on the said Francis Gatere Kihu.

2. In counts II and III, the robbers took place at the same place and time as in count II. In count I the complainant was James Irungu Muchoki who was robbed of one cell phone make Samsung and one mattress both valued at Kshs. 7500/-. In count III Ruth Nyambura Makara and she was robbed of one cell phone make Samsung Chat 222 valued at Ksh 6700/-. At the conclusion of the trial, the Appellant was convicted of the (3) three counts and sentenced to suffer death.

3. He was aggrieved by the decision and preferred the instant appeal both against both the conviction and sentence vide a Petition of Appeal filed on 22<sup>nd</sup> August, 2017. He raised eleven(11) grounds of appeal which I have summarized as under;

- a) That the Appellant was not positively identified.*
- b) That the dismissal of the Appellant's defence as an afterthought was a faulty conclusion;*
- c) That the investigations were inadequate to lead to the arrest of the Appellant; and*
- d) That the evidence was insufficient, inconsistent and unjustified.*

**Summary of evidence**

5. This being the first appellate court its duty is to reanalyzed the evidence recorded at the trial court and come up with its independent conclusions. The court must however bear in mind that it has neither heard nor seen the witnesses and give due regard for that. (**See Okeno V R**).

6. I summarize the evidence as follows. **PW1, Francis Gatere Kihu testified** that he was in the house with his roommate **PW2, James Irungu Muchoki. PW3, Ruth Nyambura Makara** came to the door knocking. PW2 went to open and as PW3 walked into the house the assailants accompanied her. He was left seated while **PW2**, who opened the door, was made to kneel. One of the two assailants wore a face mask that concealed his identity. The masked assailant bore a pistol. The other assailant bore a panga which he used to cut down a rope that

held up a curtain. The rope was used to tie **PW1** and **PW2**'s hands. The assailant bearing a gun then took off his mask and gagged **PW1** and **PW2** with insulating tape.

7. The assailants stole three mobile phones, a TV, DVD player, radio, mattress and food stuff. The robbery was conducted in a window of about 25-30 minutes. The assailants then took off and left some of the goods outside the house including speakers and foodstuff. Later the three complainants reported the matter to the police. The following day, 22<sup>nd</sup> June, 2014 **PW1** while in the company of a colleague spotted the assailants. **PW1** attempted to call the police but was unable to secure any help so he opted to instead go to the police station to report. He returned with **PW4**, **SGT Absolom Wekesa** of Ongata Rongai Police Station.

8. **PW2, James Irungu Muchoki** whilst corroborating the evidence of **PW1** testified that he heard **PW3** calling out to them to open the door. They unlocked the door. **PW3** entered the house followed by the assailants. The assailants threw her down and ordered **PW2** and **PW3** to lie down. The first assailant was masked and wielded a pistol while the other, unmasked, bore a panga. **PW1** and **PW2** were then bonded and gagged. The assailants ransacked the house and began to carry away electronics. At this point someone lit a fire and a mattress caught fire. The masked assailant then uncovered his face due to smoke. It is then that **PW2** recognized him as the Appellant as he had earlier seen him in Ongata Rongai, which information he gave to the police. He also led to the arrest of the Appellant. The lighting was on during the robbery and as such **PW2** was able to see the Appellant.

9. **PW3, Ruth Nyambura Makara** was at **PW1** and **PW2**'s doorstep when she was accosted by two men whom she had spotted in the compound. The assailants pointed a pistol at her. She had gone to borrow onions since she had noticed that they were not yet asleep. **PW2** opened the door and the assailants stormed into the house threw her to the ground and ordered **PW1** and **2** to lie down. The assailants gagged all three (3) complainants using cello tape. Someone lit a fire that burnt a mattress but the assailants managed to put it out. They then ransacked the house, took electronics and demanded for money and mobile phone. In the ordeal she lost a Samsung Dual 22 valued at Kshs 6700/-. She testified that there was electric lighting that assisted her to observe the Appellant. She added that the robber who was masked removed the mask as they left the house. It was her further testimony that as soon as the assailants left she shouted for help and urged her husband not to come out of their house.

10. **PW3** stated that she gave a report to the police indicating that she could identify the assailants. It was her testimony that she spotted the Appellant at a Kiosk. She then called **PW1** and **PW2** who came and saw the Appellant. They, at this point, called the police who came and arrested him. **PW4** effected the arrest. **PW5** was the investigating officer. He received a call from **PW1** to assist with arrest of the Appellant. He was far and directed **PW4** to effect the arrest.

11. The Appellant gave a sworn defence. It was his defence that he was arrested without knowledge of the incident that had taken place. Further, it was his defence that on the date of the incident he was asleep.

### **Analysis and determination**

12. I have critically considered the respective rival submissions. I have deduced that the only issue arising for determination is whether the case was proved beyond a reasonable doubt.

13. The most paramount issue that the court must interrogate is that of identification. This is in view of the fact that the Appellant was convicted solely on the finding of the trial court that he was positively identified. The court is thus enjoined to interrogate this evidence with due care and attention as was held in the case of **Wamunga vs R (1989) KLR 426** in which the Court of Appeal held thus;

***“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”***

14. The Appellant submitted that the identification was not proved. It was the submission of his counsel, Mr. Mathenge, that identification was flawed. It was his submission that although the complainants stated that they could identify the Appellant they failed to give his description in the Occurrence Book (OB) entry. He also noted that the trial court failed to interrogate the source, intensity and distance of light to establish that the identification was free from error. Counsel for the Respondent, Mr. Momanyi on the other hand submitted that the identification was positive because the conditions for identification, namely the Appellant's removal of the face mask and ample time to observe him were favorable.

15. The Appellant was arrested by a police officer guided by one of the complainants. It was a case of identification outside the locus in quo. This is because it was neither at the time nor place of the crime. The question that this court must answer with certainty is whether this identification was free from error.

16. The circumstances of the robbery are the focus to this court. The complainants reported to have been robbed at around 2300hrs. This was decidedly late into the night. More importantly, it was dark and so the capacity to make a positive identification by visual means was greatly diminished, if not altogether ousted. As such, the evidence of identification must be carefully analyzed in view of the prevailing difficult circumstances for a positive identification.

17. Positive identification in difficult circumstances must be accompanied by the description of the conditions that assisted the observation. In this case, **PW3** testified that there was lighting throughout the robbery that assisted her to observe the assailants. Although she did not candidly state the source of the light, a presumption can be made that she was referring to electric light. Further, all three complainants testified that there was ample time to observe the assailants as the ordeal took fifteen and thirty minutes. However, they stated that they were made to lie down or kneel. Further, it was their evidence that one assailant, whom they concluded was the Appellant, entered the house masked. It was their testimony that he later removed his mask.

18. In the case of **R V Turnbull (1976) 3 ALL ER 551** it was stated that identification in difficult conditions can only be salvaged by interrogation of the method and ability of the witness to observe the assailants. The complainants stated that their method of observation was by sight. As such, the lighting conditions needed to support this evidence. The court in the **Turnbull(supra)** case made the following remarks;

***“..... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation” At what distance” In what light” Was the observation impeded in any way” Had the witness ever seen the accused before” How often, if only occasionally, had he any special reason for remembering the accused” How much time elapsed between the original observation and the subsequent identification to the police” Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them as his actual appearance”..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

19. The complainants’ statements that there was lighting throughout the ordeal raise doubt about the details of the lighting conditions. This regards the intensity of the lighting that could have enabled them to identify their assailants. Secondly, the complainants stated that they were all made to lie or kneel down. In this instance, it begs at what point they saw the assailants when they were lying down. They also did not indicate whether at the time they were still lying down the Appellant was not masked, an indicator that they could have identified him. The complainants did not assist the court to understand their orientation in relation to the assailants during the ordeal.

20. It was their testimony that the assailant who was masked (Appellant) on accessing the house later removed his mask. There was divergence on this point. **PW1** stated that the Appellant removed his mask as he carried electronics out of the house. **PW2** and **PW3** testified that the Appellant removed his mask during a fire that lit up on a mattress following smoke that was choking. In both instances, it is difficult to understand how the Appellant was observed as he was either, in the first instance leaving the house or when smoke engulfed the house after the mattress lit. In the latter case, it is easy to conclude that visual identification was impaired by the smoke. As well, the complainants’ orientation and posture is not properly explained to understand their ability to observe the assailants. I am therefore doubtful as to the ability of the complainants to have identified the assailants. In any case, it was clear that the Assailant unmasked toward the end of the robbery when smoke engulfed the house. It begs how and within what period of time identification was sufficient when there was fire. These circumstances lead me to conclude that the Appellant was not positively identified.

21. From the foregoing, the only thing that would have erased any doubt that the Appellant was positively identified was through an identification parade. I say so because in the respect of **PW1** and **PW3** they were not previously known to the assailants. Further, no evidence was adduced as to how they were later able to inform the police that the Appellant had participated in the robbery without a prior description that they would be able to recognize him. It is also clear that dock identification could not bail out the prosecution. The witnesses had not at any point prior to stating in court that they knew the Appellant as one of the assailants, a single salient feature that isolated him as to his culpability.

22. Further, there were contradictions on the mode of the Appellant’s arrest and the events leading to the same. **PW1** testified that they met the two robbers seated at Gateke Road and that they called Ongata Rongai police station but no help was forthcoming. This led to him going to the police station where he got two officers who escorted him to the place where the robbers were and arrested the Appellant as the other robber had escaped. He left a colleague watching the robbers. **PW2** testified that he recognized the robber when he took the mask off as a man who he knew around Rongai and that he led the police to arrest this man in question whom he identified as the Appellant. **PW3** testified that she saw one of the robbers seated at a kiosk and alerted **PW1** and **PW2**. They then called the police who arrested the Appellant.

23. From this analysis it is clear that each complainant gave their account of how the Appellant was arrested which casts doubt on whether they were all referring to the Appellant. The arresting officers namely, **PW4** and **PW5** on the other hand gave differing accounts on how they arrested the Appellant. The contradictory nature of this evidence calls into question the culpability of the Appellant.

24. It was difficult in the circumstances to understand what prompted the arrest of the Appellant other than suspicion. Suspicion, however strong can never found a basis for a conviction. My finding is that the Appellant was not positively identified and his conviction was not safe. There is no doubt that a robbery took place and that the elements of the offence charged were established by the evidence adduced. But one salient issue was never established; that the Appellant committed the offence.

25. I therefore find that the prosecution did not prove their case beyond a reasonable doubt. The appeal is meritorious. I quash the conviction, set aside the sentence and order that the Appellant be set free unless otherwise lawfully held.

**Dated and delivered this 24<sup>th</sup> day of September, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

a) *M/s Mukiri h/b for Mr. mathenge for the Appellant.*

b) *Mr. Momanyi for the Respondent*