REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 44 OF 2012

JOHN NDUATI WANJIRU …… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal case No.5777 of 2010 of the Chief Magistrate's Court at Nakuru by Hon. W. Kagendo– Principal Magistrate)

JUDGMENT

1. **John Nduati Wanjiru,** the appellant herein, was convicted in two counts for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2. The particulars in count one were that on the 1st May 2010 at Mwariki Estate in **Nakuru** District within **Rift Valley** Province, jointly with others not before the court while armed with pangas robbed **Dennis Lelei Kiptoo** of Motorola C139 mobile phone and Acuma TV set all valued at Kshs. 10,500/= and at or immediately before or immediately after the time of the said robbery used actual violence to the said **Dennis Lelei Kiptoo.**

3. The appellant was sentenced to suffer death. He now appeals against both conviction and sentence.

4. The appellant was represented by Mr. Ogola, learned counsel. He raised four grounds of appeal that can be summarized as follows:

a) The learned trial magistrate erred in law and in fact by convicting the appellant on erroneous evidence of identification.

b) The learned trial magistrate erred in law and in fact by convicting the appellant when the prosecution failed to call a material witness.

c) The learned trial magistrate erred in law and in fact by convicting the appellant for the offences of robbery based on insufficient evidence.

d) The learned trial magistrate erred in law and in fact by dismissing the appellant's defence.

5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Whenever a case revolves around the issue of identification which the defence contends was not proper, the trial court has an obligation to ascertain that the said purported identification is free from error. Lord Widgery in the case of **R vs. Turnbull and others [1976] 3 All ER 549** while addressing the issue of identification gave the following guidelines:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make.How long did the witness have the accused under observation?At what distance?In what light?Was the observation impeded in any way, as for example by passing traffic or a press of people?Had the witness ever seen the accused before?How often?If only occasionally, had he any special reason for remembering the accused?How long 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 and his actual appearance?

In the instant case, though the time of the robbery has not been specified, the victims were roused from sleep. I will therefore interrogate the circumstances under which the purported recognition came to be made.

8. The witness who purported to identity the appellant was Dennis Kiptoo (PW1). He was sleeping in the sitting room with a namesake, Dennis Kiprono. His testimony was that they slept with lights on. He was roused from sleep by a loud bang. He saw figures of two people enter. When he opened his eyes, he saw one of them heading where they were while armed with a machete. He was struck on the left side of the head with the machete. When he was struck a second time, he fell down and soon thereafter became unconscious. These are the circumstances under which he purportedly recognized the appellant.

9. The narration of Dennis Kiptoo (PW1) concerning the incident, is that it took place after he was roused from sleep by bang on the door. Ordinarily, when a person is suddenly woken up it may take several seconds before he gets his bearing and appreciate what is going on. When he opened his eyes, this witness saw the robbers approaching him. This is when they cut him. The circumstances were not favourable for a positive identification or recognition. He therefore had no time to identify any of the attackers.

10. He did not mention to anybody that he had recognized the appellant. The fact that he kept enquiring about the occupant of house number six can be said that he did so. He did not mention this fact to the police at the earliest opportunity.

11. In the sitting room PW1was with Dennis Kiprono. The prosecution did not call this witness. No explanation was offered for failure to call him. This was a very material witness in the circumstances. Failure to call this witness can lead the court to draw an inference that had he been called, he would have adverse evidence to the prosecution case. This was held by the Court of Appeal for Eastern Africa in the case of **Bukenya vs. Uganda [1972] EA 549,** (Lutta Ag. Vice President) held:

> **The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

12. It would appear that that the appellant was charged based on suspicion. It was testified that when an alarm was raised, the other neighbors responded except the appellant. Again, it was testified that most of the neighbors responded. The question that went unanswered was why the other neighbors who did not respond were not suspected. No evidence was tendered to that effect. The Court of appeal in the case of **Sawe vs. Republic [2003] KLR 354** while addressing the issue of suspicion stated as follows:

> **Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.**

13. The appellant in his defence pleaded an alibi. In the case of **Kiarie V. Republic (1984)KLR 739** it was held:

> **An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.**

In the instant case, if the alibi defence is weighed against the evidence on record, it ought to have persuaded the court as plausible.

14. The evidence of PW1 and that of PW2 is that the appellant went to them and sought forgiveness. Without evidence as to what prompted the appellant to do so, one can only be tempted to conclude that this was an attempt to bolster their evidence of suspicion. In any case, the appellant denied the same and contended that he was called to sign an agreement on issues he did not know and therefore declined to do so. This is very dangerous evidence to be relied on by any court of law.

15. The learned trial magistrate erred in allowing Sergeant George Otieno (PW3) to testify on an alleged confession. This alleged confession influenced the judgment of the trial court, although she stated that the evidence remained inadmissible. Without any other evidence to connect the appellant to the robbery, it must have influenced the decision. Section 25A of the Evidence Act provides:

> **(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.**

Sergeant George Otieno (PW3) was therefore unqualified person and learned trial magistrate ought not to have allowed him to testify on the alleged confession.

16. The foregoing analysis of the evidence on record has demonstrated that the learned trial magistrate did not have any evidence at her disposal to convict the appellant. I therefore quash the conviction, set aside the sentence and accordingly set the appellant at liberty unless if otherwise lawfully held.

DATED and **SIGNED** at **Nakuru this 5th Day** of December, **2019**

KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 19th day of December, 2019

JOEL NGUGI

JUDGE