REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 23 OF 2017

JULIUS ASTUA ATIONI...1ST APPELLANT

SAMUEL CHEGE OKOTH..2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Being an Appeal from against both the conviction and the sentence of Principal Magistrate*

Hon. Kirui R. delivered on 18th of December 2006 in Molo Court Criminal Case No. 2220 of 2005.)

JUDGMENT

1. The Appellants were charged before the Molo Chief Magistrate's Court as per the Charge sheet with one count of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence as per the Charge sheet were that on the 3rd day of October 2005 at Kimangu Farm, Rongai in Nakuru District of the Rift Valley Province jointly while armed with a dangerous weapon namely a panga and wooden timber robbed Sammy Mutagia Njoroge of cash Kshs 500 and immediately before the time of such robbery used actual violence to the said Sammy Mutagia Njoroge.

2. After a fully-fledged trial, the Trial court convicted the Appellants and sentenced them to suffer death as was then mandatorily stipulated in the law.

3. The Appellants being dissatisfied with the conviction and sentence and have appealed to this court. The grounds of appeal by the 1st Appellant are that:

> *a. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on alleged evidence of identification by recognition and failed to note this was a case of mistaken identity*
>
> *b. The Learned Trial Magistrate erred in law and fact when he relied on the corroborative evidence of the expert witness yet the same witness did not measure up to the expectations required of expert witness*
>
> *c. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant on the medical evidence and yet the date of inquiry in the charge sheet and P 3 form does not allude*
>
> *d. The Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's defense*

4. The 2nd Appellant, on the other hand, raised the following grounds of appeal:

> *a. The Learned Trial Magistrate erred in law and fact by relying on unproven evidence of identification*
>
> *b. The Learned Trial Magistrate erred in law and fact by appreciating the uncorroborated evidence of a single witness*
>
> *c. The Learned Trial Magistrate erred in law and fact by failing to appreciate that no exhibits were produced in evidence to corroborate the allegations*

d. The Learned Trial Magistrate erred in law and fact by relying on the expert witness yet the same witness did not measure upto the expectation required of expert witness

e. *The Learned Trial Magistrate erred in law and fact by failing to consider my plausible defence*

5. During the trial, the Complainant testified that on the day of the incident, he went to a bar to have drinks together with two cousins. He said that he saw the two Accused Persons at the bar. He knew them before the incident. He says that as they were heading home at around 10:00pm, two or more people came from behind them and inquired where he was and one of them called him "Sammy Boy". He says that by that time another neighbour had joined him; and that that neighbour had a bicycle. In the melee, the neighbour's bicycle trapped him as the other people in his company ran away.

6. The Complainant testified that the two assailants hit him on the head, face, left knee and left arm using something like a panga and a piece of wood. They removed and took his Kshs 500 which he had put in his side pocket. He testified that as two people beat him up did they talked to each other. One addressed the other as "Waingo" which is the street name for the 1st Appellant; while the other one referred to the other assailant as "Chege." The Complaint says that the 1st Appellant asked his colleague: "Chege can I kill Sammy Boy?" Chege replied "Waingo, hit him." The Complainant says that he recognized the Appellants by their voices. He also said that at that time a vehicle passed by with its full lights on. Its illumination also helped him see the faces of the two assailants and he recognized the as the two Appellants.

7. The Complainant told the Court that he was badly injured and he lost consciousness; and that he only came to at about 3:00am. A Good Samaritan gook him to his house from where he was taken to Rongai Health Centre before being transferred to Nakuru PGH.

8. The Complainant testified that when he reported, he told the Police that he was attacked by the two Appellants and gave out their names. That is how the two were arrested by members of the public and handed over to the Police.

9. The Investigating Officer, Festua Mwenda testified as PW2. He found the case minuted to him on 03/10/2005. He conducted his investigations which included visiting the scene of the crime on 04/10/2005. He said he saw blood stains at the scene. He further testified that he found the two Appellants in the Police cells; and that he found that the names of the Appellants had been recorded by the arresting Officer. It is not clear why the arresting officer was not called to testify. It is also not clear when the report was done.

10. The final Prosecution witness was the Clinical Officer, David Cherop, who filled out the P3 Form. He said that he examined the Complainant on 05/10/2005 at Rongari Health Centre. He found that the Complainant had a cut wound on the left side of the head, heavy swollen right eye, tender and swollen right side of the thorax, tender right shoulder with reduced movements on that joint and left ankle joint of the foot. The injuries were caused by sharp and blunt objects. He classified the degree of injury as main.

11. Put on their defence, the 1st Appellant gave a sworn statement while the 2nd Appellant gave an unsworn statement. The 1st Appellant testified that on 02/10/2005, he went to church and thereafter watched a football match at Rongai until 5:30pm. He then went home arriving at 6:30pm. At 9:00pm, he said, a neighbour brought some three padlocks for repair. The following day, he recruited the 2nd Appellant to help him in harvesting maize. At around 12:30pm on that day, the Complainant's mother went to his place and asked him what had happened between the 1st Appellant and the Complainant. She told them that her son had reported to the Police that they had attacked him and that they were wanted at the Police Station. On their way there, they were confronted by a mob who tied them up and beat them up.

12. The 2nd Appellant told the Court that on 02/10/2005, he was hired by a certain woman at Rongai town to spread-dry her maize. He remained there until after 7:30pm and went home. The following day, he went to assist the 1st Appellant with harvesting maize when the Complainant's mother approached them.

13. The Learned Trial Magistrate began his analysis by making a finding that it was not in doubt that the Complainant had been robbed; and that the only question for determination was, essentially, the identity of the robbers. The Learned Trial Magistrate was persuaded that the Complainant had recognized the Appellants during the attack both by voice and visually. He believed that the conditions for recognition were favourable because of the headlights from the passing vehicle. He believed the testimony of the Complainant; and, in the same vein, disbelieved the narrative by the Appellants.

14. On appeal, the Appellant have taken up the issue of identification with gusto. They complain that the circumstances could not have been favourable for safe recognition. They also fault the Court for accepting the evidence of a single identifying witness without sufficiently warning itself of the dangers of so doing. Finally, they complain that the Court gave short shrift to their defence.

15. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic*** **[1972] EA 32**).

16. In the present case, the Appellants were convicted on the evidence of a single identifying witness. The Learned Trial Magistrate believed his narrative. However, upon a re-evaluation of the evidence, there are three aspects of the case which give me pause as to the safety of the conviction.

17. First, by the Complainant's account, he was in the company of at least three other people when he was attacked by the two Appellants. One of the three is the neighbour who had a bicycle. These were first hand witnesses; eye witnesses who saw and heard the initial parts of the attack. It is therefore quite curious why these witnesses were not called to corroborate the Complainant's accounts. It seems fair to conclude that the three witnesses would probably have had adverse evidence to the Prosecution's case.

18. Tthe prosecution has a duty to call all witnesses that are necessary to establish the truth even though their evidence may be inconsistent as was stated by the former East Africa Court of Appeal in ***Bukenya & Others v Uganda [1972] E.A. 549.*** Where a material witness is not

called, the Court may infer that the evidence of that witness would have been adverse to the Prosecution. However, this inference is only drawn where the prosecution evidence is weak and inadequate to support a conviction. It must first be established that the witness who was not called was material and essential; there is no duty to call a superfluity of witnesses to prove a particular point. See: ***John Waweru Njoka v R Court of Appeal at Nyeri Criminal Appeal 115 of 2001*** ***(2005) KLR 175*** and ***Bare Mohamed v R High Court at Garissa Criminal Appeal No. 106 of 2014).***

19. Second, it is also quite curious that there was no evidence that was led on the first report made by the Complainant. This was quite crucial because the Complainant testified that he immediately went to the Police and reported that he had been robbed by the two Appellants. Yet, neither the first report nor the evidence of the Officer who took in the report was called to verify this crucial aspect of the case. The Investigating Officer came to the case later and found the Appellants already in the Police cells. This aspect of the case seems doubly important because the P3 Form appears to suggest that when it was filled, the Police were investigating a case of assault not robbery. This raises question of the veracity of the Complainant's narrative about what exactly happened on the material day.

20. Third, there is also very sparse evidence about the movement of the Appellant from the time of the alleged robbery to being taken for treatment to the time he reported the matter to the Police. This also raises questions about the veracity of the account of the incident given by the Complainant.

21. Fourth, the Appellants raised alibi defences in their own defence. They each gave an account of where they were on 02/10/2005. The 1st Appellant gave his testimony under oath. He was not cross-examined at all on his account. No rebuttal evidence was called to negative the alibi defences proffered. This is so even though it would have been easy for the Prosecution to call other witnesses who were at the bar where the Complainant says he saw the two Appellants on the night he was attacked. These witnesses would have rebutted the alibi defence. Differently put, the Defence alibi defences were plausible and required the Prosecution to carry out its onus of proof to show that they were not true. This did not happen.

22. All in all, these significant gaps do, in my view, raise reasonable doubts about the Prosecution's narrative and make the convictions unsafe.

23. **Consequently, the appeal herein is allowed. The convictions and sentences imposed are hereby quashed. Both Appellants shall be set at liberty forthwith unless they are otherwise lawfully held in custody.**

24. Orders accordingly.

Dated and Delivered at Nakuru this 19th day of December, 2019

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JOEL NGUGI

JUDGE