REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO. 46 OF 2016

ROBERT MWANGI MUGWE.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. W.J.

GICHIMU – PRINCIPAL MAGISTRATE dated 29th April 2016 in

Nanyuki Chief Magistrate's Court Criminal Case No. 126 of 2015)

JUDGMENT

1. **WAMUYU NDUNGU CHARLES** (**the Complainant**) on 25th November 2014 was awoken by her sense of the presence of someone in her bedroom. This was at 3 a.m. She was sleeping with her three children. This is how the complainant related her evidence before the trial court, at Nanyuki Chief Magistrate's court:-

> ***"On 25th November 2014 at night at 3 a.m I was asleep. I then realised that there was a person in the bedroom. ..... when I tried to scream he asked me to keep quiet. He asked me to give him money. Suddenly three other people came in. The electricity power was on. I identified the accused (the appellant). I told him that the money was in my handbag. At that time I was in bed. He saw my phone next to the bed. He gave me his hand and I handed over the phone to him. The suspect (the appellant) was slender, dark, slim and a bit tall. He had not covered his face. The other suspects were ransacking my house removing items outside. The suspect took the handbag and emptied it at the bed. He picked the money, car keys, receipt, flash disk. It is 1st accused (the appellant) person in the dock whom I identified."***

2. The complainant further stated that the robbers were armed with panga and a pair of 'cutters'. That the appellant, Robert Mwangi Mugwe, demanded from her the laptop which he took and the robbers left.

3. The robbers also stole Kshs.20,000, 5,000 Euro, mobile phone Samsung home theatre, TV, two tablets, play station, play station Vita, play station 2, Samsung Laptop, house and car keys.

4. The robbers had gained entry to the complaint's house by cutting the window grills. The complainant stated that the robbers were in her house for about one hour.

5. The appellant was convicted before the Nanyuki Chief Magistrate's Court for the **offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code**. On being convicted the trial court sentenced him to death.

6. The appellant has filed this appeal against his conviction and sentence. This is the first appellant court, and as such this court is required to reconsider and re-evaluate the evidence on record and draw its own conclusion bearing in mind that it did not see or hear witnesses who testified at the trial: See the case of **OKENO –V- REPUBLIC (1972) EA32.**

7. Learned counsel Mr. J. M. Mwangi for the appellant relied on written submissions in support of this appeal. In those submissions learned counsel relied on the appellant's own grounds of appeal; six of them those grounds are as follows:-

> ***"1. That, the trial magistrate erred in both law and fact while basing my convicting on reliance that I was positively identified at identification parade by the complainant without considering that there was no first report that was ever tendered into the***

records.

2. That the trial magistrate erred in both law and fact while he lost direction in relying with identification parade evidence by the parade officer who testified in regard of my co-accused parade but not mine.

3. That the trial magistrate erred in both law and fact while basing my conviction relying with single evidence of the complainant without considering that there was no supportive evidence of identification at the scene of crime.

4. That, the trial magistrate erred in law and fact while convicting me with circumstantial evidence of the alleged mobile phone without putting into consideration that the same was recovered with somebody else which rendered the same to be doubtful.

5. That the trial magistrate further erred in law and fact in becoming so influenced with the mode of my arrest without considering that I was arrested after three (3) months since the offence was committed while there was no any evidence that I had gone underground.

6. That, the trial magistrate erred in law and fact when he rejected my sworn defence without considering that the same was not displaced by the prosecution side as per section 212 of the C.P.C."

8. Before embarking on dealing with those grounds it is important to set out the circumstances that led to the arrest of the appellant.

9. The arrest of the appellant was with the assistance of Stephen Mwangi (PW 2) and Eliud Kiptanui Kimaiyo (PW 3).

10. PW 2 is a resident of Eldoret. He is a driver of a taxi. On 30th November 2014, in Eldoret town, he was playing pool. He met a man called 'Guka' who he said was a good pool player. Guka asked PW 2 to lending him Kshs.2,500. As security for that loan Guka pledged a Samsung cell phone. Later Guka proposed to sell the phone to PW 2 at Kshs.4,500. PW 2 in evidence further said:-

"I took the phone. He (Guka) told me that he would deal with any claim. He (Guka) said that the phone was his and had no problems. I paid him Kshs. 4,500."

11. Subsequently PW 2 was in need of money. He offered the same cell phone for sale to PW 3. PW 2 knew PW 3 well because he used to sell to him shoes. PW 3 accepted to buy the said phone for Kshs.6,000.

12. Some months later PC Kevin Yahama (PW 8) while carrying out his investigation of the robbery found out that the complainant's cell phone was being used in Eldoret, although using another number. PW 8 proceeded to Eldoret in the company of another police officer and arrested PW 3, who was working at Wagon Hotel.

13. PW 3 informed the police officer that he had purchased the cell phone from PW 2. The police officers requested PW 2 to summon PW 3. On PW 3 arriving at the hotel he too was arrested. On being arrested he informed the police that he had purchased the phone from someone called Guka and that the said Guka had also given him a tablet to sell on his behalf.

14. PW 2 was requested by the police officer to telephone Guka and tell him that he had sold the tablet and wished to give him (Guka) the proceeds of that sale.

15. When the Guka arrived he was arrested by the police officers. That person called Guka was the appellant.

16. IP Samuel Awour (PW 6) at Nanyuki Police Station, was requested by PW 8 to conduct an identity parade. The appellant was one of the persons in the parade, while the complainant was the identifying witness. The complainant identified the appellant as one of the robbers.

17. The complainant also identified the cell phone recovered in Eldoret as her phone that had been stolen during the robbery. The complainant identified that phone by the crack it had previously developed after it had fallen.

18. Learned counsel for the appellant by his written submissions lumped together grounds of appeal number 1, 2 and 3.These three grounds fault the trial's court acceptance of the appellant's identification by the complainant.

19. The appellant's counsel submitted in support of the three grounds of appeal that "*it is incumbent on the court to exercise caution and critical analysis of the identification evidence."* Counsel relied on the case **KARIUKI NJIRU and 7 others V. R. (2001)eKLR**. Counsel did not provide that authority to this court but provided the following quote from that case:-

"The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered."

20. Further in support of the three grounds appellant submitted that the trial court erred in accepting the prosecution's evidence on identification without noting that evidence of the first report of the robbery was tendered. Appellant relied on the case of **MOSES MONYUA MUCHERU vrs CR. APP. NO. 63 OF 1987,** which case again was not supplied to this court. Appellant relied on the following passage of that case:-

"In matters of identification the first report to the police should be put in evidence so as to check whether or not a witness thinks he or she identified the suspects and by what means."

21. I must begin by stating a disclaimer of the authorities cited by the appellant. Those authorities having not been supplied to me, I cannot verify their correctness nor can I verify in what context the passage quoted by the appellant was made by the court.

22. This court however appreciates that court's have in the past pronounced themselves on the care to be taken when receiving evidence of identification under difficult circumstances. As far back as 1953 in the case **ABDALLA BIN WENDO & ANOTHER –V- REPUBLIC [1953] 20 EACA 166** the court stated:-

"Subject to certain well known exception it is trite law that a fact may be proved by testimony of a single witness but the rule does not lessen need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring correct identification were difficult."

23. The complainant's identification of the appellant on the night of the robbery was indeed under difficult circumstances but the complainant in evidence stated that the lights were on in her bedroom when the robbers carried out the robbery. The robbers were in the complainant's house for one hour. The appellant was the one who was in the bedroom where the complainant was. The complainant consistently in evidence stated that she identified the appellant at the scene because he was the one who was talking to her as the robbery progressed. This is what the complainant said in evidence in regard to the appellant:-

"I identified you (the appellant) because the lights were on, you spoke to me and I saw your face. ..... You were instructing me. There was light in the home ..... My statement shows that the lights were on."

24. The learned trial magistrate in his considered judgment referred to the complainant's identification of the appellant, at the scene, as follows:-

"From the evidence tendered before me, I have no doubt that the electric light was on. There is no evidence that the robbers used any other source of light eg: a torch. The complainant said that the light was from an energy saver bulb. She said that the light was bright enough to see a coin on the ground ..... as regards the first accused person (the appellant), the evidence shows that he was close enough to the complainant to allow her to see his face. The complainant told the court that the 1st accused person had not covered his face. The record shows that the complainant handed over her phone to the 1st accused (the appellant)."

25. Indeed the evidence of the complainant shows that she was at very close quarters with appellant as the robbery progressed. At one time the complainant spilled money from her handbag on to her bed and her evidence is that the appellant collected that money. For the appellant to have done that meant he was close enough to the complainant for him to be identified.

26. The above evidence clearly shows that the complainant had no difficulty indentifying the appellant at the scene of the robbery. The complainant in recording her statement with the police described the appellant's appearance and clothing.

27. The trial court's acceptance of that evidence cannot be faulted at all.

28. On whether the complainant's identification of the appellant can be faulted because the prosecution failed to produce in evidence the first report of the complainant, i respond in the negative.

29. I respond negatively because, firstly the prosecution's evidence is very clear that the complainant on alerting her husband on phone, who was then not at home, her husband attended the police station and reported the robbery. That husband was not an eye witness of the robbery and the report he made was according to what he was informed on phone. The police on receiving that information visited the home of the complainant and commenced investigation. What then would have been the value of producing a first report of a person who did not witness the robbery? My answer is, none.

30. The complainant, as stated before, identified the appellant in an identification parade. The appellant submitted that the evidence of the police officer (PW 6) who conducted the identification parade had an error.

31. PW 6 in giving evidence at one time stated that he had conducted the identification of the appellants co-accused. PW 6 at the tail end of his evidence in chief stated:-

"The suspect who was identified in the parade is the accused.

I think he is the 2nd accused. It was long time."

32. It was that mis-identification of the suspect who was the subject of the identification parade that led the appellant to submit that the trial court erred to have failed to note that error.

33. What the appellant failed to note was that PW 6 in describing in evidence in chief how he conducted the identification parade, clearly identified the person who was being identified as Robert Mwangi, the appellant. It was as he was concluding that evidence in chief; and it does seem that he may have been responding to a question: of the two accused before court, who was the subject of the identification, that he

responded:-

> **"I think he is the 2nd accused (the appellant's co accused)"**

He qualified that answer by saying there had been a long passage of time since the parade was conducted; seeming to mean that he was not clear on his identification of which of the two accused was Robert Mwangi. It follows that nothing comes out of the appellant's arguments that the trial court erred in that regard.

34. Moreover courts have considered how inconsistencies or discrepancies of evidence should be regarded. In the case **JOSEPH MAINA MWANGI –vrs- REPUBLIC CRIMINAL APPEAL NO. 73 OF 1993** the learned judges of appeal held:-

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."***

In the case **PHILIP NZAKA WATU V REPUBLIC [2016] eKLR** the Court of Appeal stated:-

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***

In **DICKSON ELIA NSAMBA SHAPWATA & ANOTHER v THE REPUBLIC, CR. APP. NO. 92 of 2007** the Court of Appeal Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:-

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

35. PW 6's discrepancy is not so fundamental to cause prejudice. It follows that the very slight inconsistency of PW 6 bears no material which can lead this court to fault the trial court.

36. The appellant erred to suggest the complainant's evidence should not have been relied upon by the trial court because the complainant said on the night of the robbery, she identified the appellant's co-accused because he had a swelling, but when she was called to an identification parade, to identify the appellant's co-accused she noted he had no swelling.

37. Perhaps appellant's said submissions are as a result of his lack of appreciation of what a swelling is. The Cambridge dictionary defines swelling as:-

> **"a part of your body that has become bigger because of illness or injury."**

38. Swelling as the above definition shows, occurs because of illness or injury. Swelling, therefore is not always permanent. The swelling is bound to go down if one recovers from the illness or injury that is causing it. Can one then expect that a swelling that was seen on 25th November 2014, the day of robbery, to still be there on 16th April 2015 when the identification parade was carried out. As a result of this discussion, on that issue, I reject submissions of the appellant.

39. The police identification parade is governed by the 'Force Standing Orders' which were printed on the form which the records of the identification process is reflected. That form begins by having the statement that *"whenever it is necessary that witness be asked to identify an accused/ suspect person, the following procedure must be followed in detail."*

40. The form then, amongst other conditions, indicates the suspect should be informed the reason the parade is set up; the investigating officers is not permitted to be in charge of the identification parade; the identifying witness should not see the person to be identified; the person to be identified should be amongst eight other persons who have similar features; and the pertinent provision, to this case, provides:-

> ***"When explaining the procedure to a witness the officer conducting the parade will tell him that he will see a group of people which may or may not contain the person responsible. The witness should not be told "to pick out somebody" or be influence in any way whatsoever."***

41. Bearing the above condition to be met when an identification parade is conducted, the appellant submitted that PW 6 while conducting identification parade of the appellant did not alert the complainant that the 'suspect may or may not be in the identification parade.' Appellant submitted that, that failure could have led the complainant to attend the parade with a *"closed mind that indeed the suspect must have been in the parade and that [she] had to identify a person"*.

42. PW 6 in evidence in chief stated as reflected in the typed proceedings what he told the complainant as she attended the parade:-

I told the witness that one of the suspects may be in the parade and she was asked to go see if she could identify the suspect."

43. Whereas that statements cannot be faulted because the use of the 'may' shows it is not definitive that the suspect was there; I however need to state that I examined the hand written proceedings of the trial court and unless I am mistaken on the learned trial magistrate's writing it does seem that the correct record of what PW 6 said was *"..... suspect may not be there....."* If that summation of the handwritten proceedings of the trial court are correct, then PW 6 followed the guidelines of the identification parade. I therefore reject the appellant's submissions in that regard.

44. Appellant in respect to grounds of appeal number 4 and 5 submitted that the evidence of appellants possession of complainant's cell phone was circumstantial and should not have been relied upon by the trial court.

45. The learned author Alan Taylor in the book '*Principles of Evidence'* had this to say on what evidence can be termed as circumstantial:-

> **"Circumstantial evidence:** ***What does it mean? It is probably best thought of as evidence which falls short of directly establishing a fact in issue, but which is admissible by reason of its relevance to the fact in issue. A particular set of circumstances may lead to the appropriate inference being drawn: for example, nobody saw the accused in flagrante delicto, but he was seen in the area jut before the victim, against whom he was known to have borne a grudge, was murdered, and his fingerprints were found at the scene of the crime. The inference to be drawn from these circumstances is that that the accused was the murdered, even though no one saw him do it and there is no direct evidence, only circumstantial evidence, that it was him."***

46. Considering the prosecution's clear evidence on possession or theft of the cell phone, it cannot, by any stretch of imagination, be termed as circumstantial. The complainant identified the appellant as the person who took her cell phone, from her hands at scene where there was adequate lighting. The PW 2 gave evidence of how he purchased the same cell phone from the appellant, whom he was able to summon when requested to.

47. The appellant sold the cell phone to PW 2 on 30th November 2014.The robbery took place on 25th November 2014. That is five days after the robbery PW 2 confirmed the complainant's cell phone was in the appellant's possession. That evidence in its entirety is direct and very cogent evidence.

48. The appellant, contrary to his submission was given all the opportunity to explain his possession of the cell phone firstly while cross examining the prosecution's witnesses, and secondly when he offered his defence.

49. Appellant's cross examination of the complainant and of PW 2 did not shake their clear evidence that he was the robber who first took the cell phone from the complainant at the scene of robbery and secondly that he was the one who sold it to PW 2.

50. The appellant's defence was that he was not involved in the robbery. That he was conducting his business, on 11th February 2016 at 6 p.m. when his former girl friend called him over to where she was in a motor vehicle. That the said former girlfriend had him arrested. Appellant said that he had separated with his said girl friend, who used to work at CID office in Eldoret, and that as a consequence of that break up that girlfriend by the name Hilda Nyamai, told him that his "*time had come"*.

51. Appellant, for the very first time raised the defence of being framed for the offence. He did not, while cross examining the prosecution's witness, and in particularly when cross examining the police officer who testified, state that he was arrested because he had separated with his girl friend who worked at C.I.D Eldoret. The closest the appellant got is to ask PW 8 a question which elicited the answer from PW 8;-

> ***"It is not true that you were arrested because of a dispute with a woman."***

52. The appellant defence was an afterthought and the trial court rightly rejected it. It was not believable and I too reject it. That defence in the light of very clear evidence of the complainant and PW 2 is dismissed.

53. The appellant was arrested in Eldoret on 11th February 2015 at 8 p.m. as per O.B. He was presented before court on 16th February 2015. 11th February was a Wednesday. The officers who arrested him had travelled from Nanyuki to pick him. PW 8 in response to a question why he delayed to produce the appellant before court within 24 hours of arrest stated:-

> ***"The delay was occasioned by the fact that you were arrested in Eldoret. Your were not charged in Eldoret ..... You were brought to Nanyuki Station on 13/2/2015."***

54. The robbery took place in Nanyuki town hence why the appellant was transported to Nanyuki. He was booked at Nanyuki police station on 13th February 2015, which day was Friday. He was presented to court on Monday 16th February 2015.

55. In my view, contrary to the appellant's submissions on ground 6 of appeal there was reasonable explanation why the appellant could not be presented to court within the 24 hours provided under **Article 49(1)(f)** of the constitution.

56. The appellant erred to rely on the, now outdated case **REPUBLIC v MWANGI GICHUKI, and 3 others Nyeri High Court Criminal Case no. 7 of 2007.** It was held in that case that because the accused persons had been produced in court after the period set out in the constitution they were entitled to be acquitted.

57. I said that the above case is outdated because the Court of Appeal has had occasion to pronounce itself on the matter and held that such prolonged detention of a suspect should not lead to his acquittal. Similar discussion was in the case **KOMU MWANGI V REPUBLIC [2013] eKLR** viz:-

> **"There are many instances in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal.** *(See Dominic MutieMwalimu – v – R Criminal Appeal No. 217 of 2005; and Evanson K. Chege –v- R Criminal Appeal No. 722 of 2007).* **This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In** *Julius Kamau Mbugua –v – R Criminal Appeal No. 50 of 2008*, **this court stated that:-**
>
> ***"A trial court takes cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police*** *per se* ***is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of criminal court and which is by section 72(6) expressly compensatable by damages.'***
>
> **In Julius Kamau Mbugua –v- r Criminal Appeal No. 50 of 2008, this court upheld the proposition that even where violation or right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrate that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit."**

58. Similarly in this case the appellant did not suffer prejudice which would warrant an acquittal. Having reconsidered the trial court's evidence I do hereby find that the prosecution's evidence overwhelmingly connected the appellant to the robbery. The trial court's conviction was sound.

59. Accordingly the **appellant's appeal is hereby dismissed, the trial court's conviction is upheld and the sentence is confirmed.**

DATED and DELIVERED at NANYUKI THIS 14TH day of FEBRUARY 2018.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Robert Mwangi Mugwe .....

For the State: .....

Language: .....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE