REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 7 OF 2014

DAVID MANEGENE GITHAKA……1ST APPELLANT

JOHN BUNDI MUNENE……..2ND APPELLANT

FRANCIS NYAMU MUNENE…….3RD APPELLANT

-VERSUS-

REPUBLIC…….....…….…….....RESPONDENT

(An appeal from the conviction and sentence of the Chief

Magistrate's Court ((Teresia Ngugi) at Kerugoya, Criminal

Case No. 583 of 2012 delivered on 23rd January, 2012)

JUDGMENT

1. The appellants **John Bundi Munene, David Manegene Githaka and Francis Nyamu Munene** were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** before the Chief Magistrate's Court Kerugoya in Criminal Case No. 583 of 2012. It was alleged that on the 10th November, 2008 at Kamboini in Kirinyaga South District within Kirinyaga County jointly with others not before the Court, while armed with dangerous weapons namely pangas robbed Cecily Wangechi Kinyua Ksh. 46,000/= and at or immediately before or immediately after the time of such robbery wounded the said Cecily Wangechi Kinyua. The appellants denied the charges and after a full trial they were found guilty, convicted and sentenced to death.

2. The appellants were dissatisfied with the conviction and sentence and filed this appeal which raises the following grounds:-

i. That the learned magistrate erred in failing to adhere to the request of the appellant to have OB request.

ii. That the learned magistrate erred by not considering that the complainant while in hospital never revealed the names of her attackers or their physical appearance.

iii. That the learned magistrate erred by not considering that P.W. 1 – P.W. 5 gave different statement on occurrence of the incidence despite the fact that they were all in the same house.

iv. That the learned magistrate erred in failing to address to the fact that the testimony of P.W. 1,

P.W. 2 and P.W. 5 amounted to single evidence.

v. That the learned magistrate erred in failing to consider that after the complainant was discharged, she did not tell anybody that she knew her attackers though the magistrate said that P.W. 2 and P.W. 5 mentioned the attackers resulting in their arrest.

3. This being the first appeal this Court has a duty to re-evaluate the evidence, analyse it and reconsider it and make its own independent finding but bearing in mind that it had no opportunity to hear and see the witnesses and leave room for that. This was held in the case of **Okeno -V- R (1972) E.A. 32** which has been upheld in various other decisions of the High Court and the Court of Appeal like in **Odongo -V- R, Court of Appeal 2009/KRL 261** where the Court stated that being the first appeal, "the appellant is entitled to expect the evidence tendered in the superior Court to be subject to a fresh and exhaustive examination and have this Court's decision on that evidence. But as we do so we must bear in mind that we have not had the advantage (which the learned judge had) of hearing and seeing the witnesses and give allowance for that **(see Okeno -V- R (1972) E.A. 32** and **Mwangi -V- R (2006) 2 KLR 28".**

1. Analysis of the Evidence

4. The prosecution called eight (8) witnesses. P.W. 1 Cecily is the complainant in this case. She testified that on the night of 9th, 10th November, 2008 at 2.00 a.m. while in her house she was ordered to open the house by a person who said they are policemen. She lit a lamp and went to the sitting. She opened the door and some men who she recognized as her neighbours entered. They had not covered their faces. They asked her if she had a cell phone or money. They cut her three times. She gave them Ksh.46,000/= which was proceed of sale of rice. She identified 1st accused as the person who was cutting her. The others who were in company of 1st appellant are 2nd and 3rd appellants. After that she found herself in hospital where she was admitted for seven days. It was her testimony that the three appellants were armed with pangas which were used to wound her.

5. From evidence of P.W. 1 it is clear that she had recognized the appellants. They are people she knew and she had lit a lamp which gave light and enabled her to see and recognize them. She had recorded a statement and listed the 3 appellants and the name of another who is not before Court.

6. P.W. 2 **Rhoda Wanjiru Kinyua** is P.W. 1's daughter who was in the house at the material time. She testified that when the attackers who had posed as policemen, there was a lamp. She recognized the attackers as they were people she knew. She identified the appellants as the people who attacked them that night.

7. P.W. 5 Kelvin Muriithi on his part told the Court that he was at home when the robbers struck. He identified the three appellants as the people who attacked them on that material night. He testified that the appellants are people he knew before.

8. From the evidence of P.W. 1, 2 and 5 who were present in the house during the robbery, they place the appellants at the scene of the robbery. They are people who the witnesses knew even by name. Nothing was put to the witnesses to suggest that they would have had reason to frame the appellants. I find no reason to doubt the 3 witnesses.

9. P.W. 3 **James Karungo Njeru** testified that he heard screams and went to the rescue of the complainant. He found the complainant writhing in pain as she had injuries. She was taken to Kerugoya hospital. He was left guarding the house. Later at 7.00 a.m. he received a call saying it was Karakara and others who attacked the complainant. He went to the home of Karakara and found him with David Nyamu and Bomba. Karakara was holding an axe but he disarmed him. Karakara said Bomba and David Nyamu were also involved. P.W. 3 identified Karakara as the 1st appellant, 2nd appellant is David and 3rd appellant. P.W. 3 confirms the fact of the robbery and that the three appellants were the suspects.

10. P.W. 4 **James Mithamo** a clinical officer testified that the complainant, Cecily Wangechi was treated

at the hospital on 10th November, 2008 after being attacked by people known to her. He treated her. She had six cuts on the head and had cuts on both hands. The degree of injury was maim. He filled the P.3 form exhibit 1.

11. P.W. 6 testified that he received the report and went to visit the complainant at Kerugoya hospital. He found she was unconscious and had injuries. P.W. 6 went and reported to the Police. Later the complainant mentioned Karakara, David, Bomba and Nyamu. He then called the sub-chief and informed him that the complainant had mentioned the assailants.

12. P.W. 7 **Frank Ngari Muriuki** is the assistant chief Koimbuini where the incident took place. He testified that he received the report of the robbery. He went to the chief's camp ad while there the 1st appellant John Bundi alias Karakara was brought there by irate members of the public. He took him to Sagana Police Station. Later the 2nd and 3rd appellants were arrested after being mentioned by the children of the complainant.

13. P.W. 8 is P.C. **Halakano Golicha.** He testified that the incident happened on the night of 9th and 10th November, 2008. The complainant was attacked by a gang armed with pangas and robbed ksh.46,000/=. The appellants were identified by the complainant. 1st appellant was arrested by members of the public. They were then charged.

14. The evidence adduced by the prosecution was cogent and proved beyond any reasonable doubts that the appellants were recognized by the witnesses who knew them very well. They were placed at the scene of the robbery by P.W. 1, 2 and 5. There is no reason to doubt the testimony of the three witnesses and nothing was alleged which could make this Court doubt their testimony. My finding is that based on the evidence presented before the trial Court, the conviction of the appellants was proper.

15. The defence tendered by the 1st appellant is a mere denial. Though he said he was asleep in his house, it is possible he could have gone back to his house after committing the offence because his home is near the complainant's home. Other matters raised in his defence were not put to P.W. 2 and 5 when they were cross-examined and cannot possibly be true. He admitted that he had no problems with the complainant and her children and as such they would not have had any reason to frame him. The 1st accused was recognized during the robbery in circumstances that favoured positive recognition. The law is clear that recognition is better than identification of a stranger.

16. The 2nd appellant David Manegene gave a defence that on the material night he was admitted at Kerugoya District Hospital and was discharged on 11th November, 2008. He was not truthful. If he was arrested for possessing bhang he could have been charged. The allegation that the complainant had abused her for demolishing a bridge was not put to her. It is an after thought. The defence of alibi by the 2nd appellant was dislodged by the prosecution with the evidence of P.W. 9 **James Njora Nduku** who confirmed that the documents produced by the 2nd appellant did not originate from the records of Kerugoya District Hospital. The defence of 2nd appellant was a sham and based on lies.

17. The 3rd appellant Francis Nyamu Muriithi gave a defence which was a general denial. He confirmed that the complainant had no reason to frame her as they had no grudges. I find that the trial magistrate was right to reject the defence of the appellants. The appellants were recognized by people who they admit knew them and had no reason to frame them. The appellants were properly convicted.

18. <u>Issues Arising from grounds of appeal</u>

<u>1. Occurrence Book not supplied</u>

The appellants requested to be supplied with Occurrence Book No. 4 of 9th November, 2008 but they were never supplied with it therefore they were not afforded a fair hearing.

In the case of Republic V Ernest Ojiambo Mulefu Alias Museveni & another [2015] eKLR in a similar case where the Occurrence Book was requested but not supplied, the court held:

> ***"……..15th May 2014, Mr. Wanyama acting for the Accused persons applied that the Defence be furnished with certified copies of certain Occurrence Book entries. If indeed the consent order had not been complied with, then one would have expected the Defence to raise it on that day……If there was substance in this allegation then one would have expected the new Advocate to take up the issue with Court at the earliest opportunity. It is therefore surprising that Mr. Makokha who took over from Mr. Wanyama and conducted the Defence in respect to five witnesses did not find it necessary to raise any complaint about non-compliance of the consent order before the close of the Prosecution case. I do not find any merit in this complaint."***

In this case though the appellants called for Occurrence Book, the matter was never followed up despite the fact they were being represented by an advocate. The matter proceeded for prosecution and defence hearing but there was no mention that the Occurrence Book was yet to be supplied to them.

It is not unusual for parties to abandon applications made during the trial. It seems the defence abandoned this prayer. At the close of the defence evidence, the defence counsel stated at page 77 (in red) of the record, "We do not wish to call any other evidence. That is the close of the defence." The counsel Mr. Kinyua is the one who was representing the appellants. He had applied for Occurrence Book and the time he closed the defence it had not been availed. It can safely be stated that he abandoned that evidence. It should also be noted that what matters in the trial is the evidence. What is contained in the Occurrence Book is the process of Police investigations. The trial follows those investigations and the evidence is presented in Court to support the charges. The Court is supposed to ensure that the rights of the persons accused are not violated and that there is a fair trial. **Article 50 (2) (c)** of the **Constitution** provides:

> ***"Every accused person has the right to a fair trial which includes the right –***
>
> ***-to have adequate time and facility to prepare a defence."***

The Court ensured that the appellants were accorded the right. It is expected that if the appellants wanted to use the Occurrence Book in their defence they could have informed the Court it was not supplied. Once the counsel stated that he did not wish to adduce further evidence despite the fact that he had not been supplied with there must be an inference that he had found that the evidence in the Occurrence Book was not necessary or alternatively that he decided to abandon that evidence. I am of the view that the Court ensure that the appellants were afforded a fair trial and their decision to abandon the request on the Occurrence Book cannot be blamed on the Court or the State. The proceedings show that there was fair trial and no prejudice or injustice was occasioned.

2. Identification

The appellants claim that the complainant did not reveal the names of her attackers while in hospital and after she was discharged.

P.W. 3 stated that he received a call that the complainant had mentioned Karakara as one of her attackers when she regained consciousness page 34 line 6-10. This was supported by the evidence of P.W. 2 and P.W. 5 who confirmed that he was among the attackers. At page 36 line 15, P.W. 3 in cross-examination confirmed that P.W. 1 came to briefly that morning and mentioned Karakara then lost consciousness. P.W. 4 confirmed that the complainant was admitted while unconscious but started regaining after being attended to, page 41 line 8. The complainant stated that the appellants who identified themselves as police officers ordered her to open the door. She lit a lamp and placed on the table and went to open the door. She was able to identify the appellants who had not covered their heads and who were her close neighbours. They even knew them by their nicknames and P.W. 2 used to go to school with some but they were ahead of her in class. Therefore not only did P.W. 1, P.W. 2 identify the appellants using the

lamp and torches but they were able to recognize them also. In the case of **Peter Kerera V Republic [2014] KLR** the Court of Appeal in dismissing the appeal stated:

> ***"Recognition is more reliable than identification of a stranger. As this Court stated in case of ANJONONI V R, KLR 1 [1976-1980] AT 1566 TO 1568 this is because:***
>
> ***"……recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***
>
> ***Although the conviction was based on the evidence of a single witness, we are satisfied that both the trial court and the High Court properly directed themselves on the question of identification of the appellant. Both courts made concurrent findings of fact that the appellant was known to P.W. 1 for several years before the day of the attack."***

In the case of **Mwendwa Kilonzo & another V Republic [2013] eKLR** the Court of Appeal upheld the trial court and High Court decisions which they quoted as follows:

"This is what the learned trial magistrate found on this point:

> ***"Though it was at night there was adequate light from the bright torches that the accused persons had. This complied with the fact the robbery occurred in a single room enabled witnesses to identify the accused."***
>
> ***The learned judges, on the whole evidence of identification, concluded:***
>
> ***"In our own assessment of the evidence adduced before the trial court, we hold that the appellants were positively identified at the scene of crime."***

In the case of **Peter Musau Mwanzia V Republic [2008] eKLR** the Court of Appeal dealt with the issue of recognition and stated:

> ***"In the well known case of R vs Turnbull (1976) 3 LL ER 549 at page 552, it was stated: "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." We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger……***
>
> ***Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."***

My view is that the appellants were recognized during the robbery. There were no other suspects. It was not suspicion but recognition which place them at the scene of the robbery. The Respondent submits and rightly so, that as correctly put by P.W. 1 in her evidence she may not have had proper memory as she had been cut on the head, however, the fact that the appellants were people who were well known to her even before this act, negates the appeal on this ground as it does not matter at what point P.W. 1 was able to give the names of the attackers to her relatives and the Police. This ground must fail.

3. Inconsistent and contradictory evidence

The contradiction in the evidence as raised by the appellants was when the complainant recorded her statement.

She states that she recorded two statements, one while in hospital and the other after she was discharged. The incident occurred on the night of 9th – 10th November 2008 and she was admitted in hospital for a period of 7 days. At one time she states "The 1st statement I recorded while still admitted in hospital……it was on 10th." Then the next paragraph she states "I recorded the next statement on 10th. I see the statement dated 2nd January, 2009. I recorded at Sagana Police Station." Therefore there seems to be confusion on the dates the complainant recorded her statements. However, the alleged contradiction was not material since it was confirmed that the complainant was attacked and the appellants were identified as the attackers by P.W. 1, 2 and 5.

In the case of **Daniel Njoroge Mbugua V Republic [2014] eKLR** the Court of Appeal stated:

> ***"From the record, we find that the evidence of P.W. 1 and P.W. 2 was consistent and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record."***

Not every inconsistency will affect the prosecution case. It must be such that it casts doubts on the prosecution case and raises doubts on the credibility of witnesses to the extent that no weight will be given to that evidence and is itself of no probative value. The complainant testified and her evidence was firm on the material particulars and was corroborated. The discrepancies pointed were minor and raise no doubts in the prosecution case.

19. The evidence given by P.W. 1, 2 and 5 who were present in the house were consistent and did not raise any material contradictions on the sequence of events and who the attackers were. It was traumatizing to all of them especially to the children who saw their wounded mother on the ground not knowing whether she was still alive, they were however, subjected to cross-examination and remained firm in their testimony. It is evidence which was well corroborated by five and not by a single witness as alleged by the appellants. The ground fails.

20. (4) Was the prosecution case proved beyond any reasonable doubts?

It is trite law that the burden of proof always lies with the prosecution to prove their case and the burden never shifts. **Section 296 (2)** of the **Penal Code** provides:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

In the case of **Daniel Njoroge Mbugua V Republic [2014] eKLR** the Court of Appeal stated:

> ***"The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of Oluoch Vs Republic (1985) KLR where it was held that robbery with violence is committed in any of the following circumstances:***
>
> ***a. "The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***b. The offender is in company with one or more person or persons; or***
>
> ***c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person……."emphasis supplied.***

In this instant case the appellants were together and they robbed the complainant of her cash Kshs.46,000/= and inflicted injuries on her. Therefore, all the conditions above have been fulfilled.

21. Looking at the whole evidence adduced, the prosecution has proven its case beyond all reasonable

doubts. The entire evidence on record left no doubt, as the trial court found, that the appellants robbed the complainant in the manner described. The trial court considered all the evidence presented and having done so came to a proper and inevitable conclusion.

22. The learned trial magistrate fully considered the evidence of P.W. 2 and 5 and that of P.W. 6 and 7 on how the appellants were arrested and in her judgment, page 4 line 5, it is clear the information was given to P.W. 6 who informed P.W. 7. They were mentioned by the complainant and her children. It was proved that the three appellants and another robbed her Ksh.46,000/= , the complainant while armed with dangerous weapons namely pangas. They wounded the complainant as proved by medical evidence as adduced by P.W. 4 who produced the P.3 form exhibit 1, which shows that she sustained injuries which left her maimed. The injuries were caused by a sharp object, the weapons the attackers had. There is proof beyond any reasonable doubts that the appellants are the ones who robbed the complainant. The appeal is without merits and is dismissed. I uphold the conviction and sentence.

Dated and delivered at Kerugoya this 8th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, appellants present, Mr. Sitati State counsel for the State, court assistant Naomi Murage this 8th day of February, 2018.

L. W. GITARI

JUDGE

8.02.2018