



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 2 OF 2014**

**(An Appeal arising out of the conviction and sentence of Hon. Daniel Ochenja – Ag. CM delivered on 29<sup>th</sup> November 2013 in Kibera CMC. CR. Case No.1202 of 2011)**

**PATRICK MBURU WAWERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Patrick Mburu Waweru was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 26<sup>th</sup> March 2011 at Githongoro Village, Runda in Nairobi County, the Appellant jointly with others not before court, while armed with iron bars and a timber plank, robbed Michael Kibe Waweru of Kshs.1,600/-, his identity card and a mobile phone make Samsung Serial No.RVS QB75621H all valued at Kshs.3,100/- and at the time of such robbery, used actual violence against the said Michael Kibe Waweru (the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that was made in difficult circumstances that did not favour positive identification. He took issue with the fact that he was convicted on the evidence of a single identifying witness without further evidence in corroboration. The Appellant faulted the trial magistrate for failing to properly evaluate the entire evidence that was adduced by the prosecution witnesses and thereby reached the erroneous determination that he was guilty as charged. In particular, he was aggrieved that the evidence regarding the circumstances of his arrest was not interrogated by the trial court before reaching the impugned verdict. He faulted the trial magistrate for failing to consider his defence, particularly the fact that the mobile phone allegedly found in his possession was planted on him and thereby reached the faulty conclusion that he was guilty as charged. He was finally aggrieved that the trial magistrate failed to properly evaluate the evidence in totality and therefore wrongly convicted him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Sigei for the State opposed the appeal. She made oral submission to the effect that the prosecution witnesses had adduced sufficient culpatory evidence to connect the Appellant with the commission of the offence. She urged the court to dismiss the appeal. This court shall revert to the argument made on this appeal after briefly setting out the facts of the case.

The complainant in this case is a resident of Githongoro Village, Runda in Nairobi County. He testified that on 26<sup>th</sup> March 2011, after work, he decided to go to a club near his home to have a drink. He took several drinks in two clubs, the final one being Ulezi Bar at Matopeni. The complainant drunk with his two friends called Kimani and Kinyua. From his testimony, it was apparent that he drunk from about 7.00 p.m. to 9.45 p.m. when he decided to go home. On his way home, he was accosted by a gang of robbers who chocked him before beating him until he lost consciousness. When he came to, he discovered that he had been injured on his head and on his right hand. These injuries were inflicted by a metal bar used by the robbers. He told the court that he was robbed of his mobile phone, identity card and Kshs.1,600/- which was in his pocket. He testified that during the course of the robbery, which was in an area lit by street lights, he was able to identify the Appellant as being a member of the gang that robbed him. He was able to identify the Appellant because he had known him for about two years prior to the robbery incident. After the robbery incident, the complainant went home and slept. He went to hospital the following day. The injury on his head was stitched. He thereafter reported the incident to the police.

PW2 PC Samuel Benson then based at Runda Police Station testified that he recorded a complaint from the complainant on 27<sup>th</sup> March 2011. The complainant told him that he had been robbed of his mobile phone make Samsung, Kshs.1,600/- and his identity card. He issued him with a P3 form which was to be filled by a doctor. It was not clear from his evidence if the complainant reported that he had identified the

Appellant as one of his assailants. On 1<sup>st</sup> April 2011, the complainant led the police to the arrest of the Appellant at his home in Githongoro Village. On 3<sup>rd</sup> April 2011, after interrogation, the Appellant accompanied by PW2 and PW5 PC Masai Kithuku went to the house of the Appellant. Upon a search being conducted, the mobile phone which the complainant claimed to belong to him, was recovered. The Appellant testified that he was able to identify this particular mobile phone as his due to three scratches that he had notched on the battery. He told the court that he had misplaced the receipt that he had used to purchase the mobile phone. He did not give any other distinctive characteristic of the phone that made him be certain that the phone was his. No inventory was prepared by PW2 and PW5 at the time of the alleged recovery of the mobile phone in the Appellant's house. The complainant was examined by Dr. Kamau on 1<sup>st</sup> April 2011 at the Police Surgery. He saw a sutured wound on the right frontal head. The complainant had bruises on the left forehead. He had bruises on the left side of the neck. He also had bruises and swelling below the medial aspect of the right knee. He attributed the injuries to a blunt object. The P3 form was produced into evidence on behalf of Dr. Kamau by PW3 Dr. Joseph Maundu.

When the Appellant was put on his defence, he denied the assertion that he had robbed or assaulted the complainant. It was his defence that he was framed up with the robbery charge. He denied that the complainant's mobile phone was found in his possession. He was of the view that he was a victim of extortion. He testified that after his arrest by police, the complainant demanded that he pays him Kshs.60,000/- for the charge to be withdrawn. He did not have such kind of money hence, the decision by the police to charge him. He pleaded his innocence for the offence that he was charged with.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

**“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.**

In the present appeal, the issue for determination is whether the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant robbed the complainant in accordance with the charge brought under **Section 296(2) of the Penal Code.**

From this court's re-evaluation of the evidence adduced before the trial court, and the submission made by the parties to this appeal, it was clear to this court that the Appellant was convicted on the basis of two pieces of evidence. The first piece is the evidence of identification. According to the complainant, he was accosted by a gang of robbers at about 10.00 p.m. when he was on his way home after having an evening out with his friends. The complainant had taken several drinks. From his testimony, it was apparent that he was to a certain extent intoxicated. His cognitive faculties were therefore, to some extent, impaired. It was his evidence that he was choked before being beaten with a metal bar after which he was robbed. He lost consciousness from the beating. He told the court that he was able to recognize the Appellant as a member of gang that robbed him.

It was not clear from his testimony how the complainant was certain that he had recognized the Appellant as one of his assailants. He did not give the description of the clothes that the Appellant was alleged to have worn on the material night. Although he testified that there was sufficient light from the street lights, it was not evidence from his testimony as to what angle the lights were illuminating the scene of crime to enable him be positive that he had identified the Appellant as one of his assailants. It is not clear from the complainant's testimony if he identified the Appellant in the first report that he made to the police. The circumstances of the Appellant's arrest also pointed to doubt as to whether indeed the complainant positively identified the Appellant as one of his assailants. This court is not satisfied to the required standard of proof beyond any reasonable doubt that the complainant identified the Appellant when he was robbed on the material night.

The other piece of evidence that the prosecution relied on to secure the conviction of the Appellant is the evidence of the recovery of the mobile phone that was allegedly robbed from the complainant in the Appellant's possession. According to the investigating officer, upon the arrest of the Appellant, the Appellant volunteered to take him to his house where, in a bag, the mobile phone that was robbed the complainant was recovered. It is noteworthy that no inventory was prepared nor was such inventory signed by the Appellant to confirm that the mobile phone was recovered in his presence. Further, the evidence of the complainant as regard to how he was able to identify the mobile phone as belonging to him was not to the required standard of proof. The complainant testified that he was able to identify the mobile phone by three scratches on the battery of the mobile phone. He did not produce any document to confirm ownership of the mobile phone.

In the premises therefore, this court was not satisfied that the mobile phone that was allegedly recovered in the Appellant's possession was indeed recovered in the manner stated by the investigating officer. Further, it was not clear whether indeed the particular mobile phone belonged to the Appellant. These being the only pieces of evidence that the prosecution relied on to secure the conviction of the Appellant, the contention by the Appellant that the evidence was contrived to frame him after he had refused to pay **“compensation”** may not be off the mark.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit and is hereby allowed. The Appellant's conviction is quashed. He is acquitted of the charge. The sentence imposed upon him is set aside. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**