REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 137 OF 2015

GERALD MUNYAO NGAA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **Gerald Munyao Ngaa** was tried and convicted of the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2**) of the **Penal Code**. He faced an alternative charge of handling stolen goods contrary to **Section 322 (i)** of the **Penal Code**. He was also charged with the offence of being in possession of an imitation firearm contrary to **Section 34 (i) of the Firearms Act Cap 114 Laws of Kenya.**

His co-accused, one **Faith Chepkonga** (2nd accused) faced similar charges. After trial **Faith Chepkonga** was acquitted while the appellant was convicted on count 1 and sentenced to suffer death as by law provided. He was also convicted on count 2 namely on the charge of being in possession of an imitation of a firearm contrary to **Section 34 (i)** of the **Firearms Act (Cap 114)** and the sentence was held in abeyance.

2. The brief facts of the case before the trial court was as follows: The complainant was at a club where he was joined by a lady one Faith Chepkonga (2nd accused). After buying her a drink she requested him to drop her home. While at the gate to her house, they were confronted by 3 men who carjacked them and entered the complainant's house and stole various household goods including two microwaves, T.V set, Zuku decoder, carpet, perfumes and cash. They robbed the complainant of his car registration KBS 866T, Toyota Hilux Double Cabin. The car had a car track and was tracked to Kapsabet. The occupants of the car drove to side road from where they jumped out of the car and attempted to run away when they were cornered by the police. A woman was arrested near the car while one man was arrested by members of the public who gave chase while one other man disappeared.

3. It later turned out that the lady was the same person who had sought a lift from the complainant and the man was one of the persons who had robbed the complainant of his car. They were taken back to Nakuru where the man led police to his house from where the stolen household goods were recovered. Both the man and the woman were subsequently charged as 1st and 2nd accused respectively.

4. The appellant was dissatisfied with the judgment and has appealed to this court against both conviction and sentence. In his petition of appeal dated 22nd May 2015 he raises 8 grounds of appeal challenging evidence respecting his arrest; his identification; recovery of the stolen items and inventory thereof; the evidence of the investigation officer and the accuracy of the photographic evidence produced.

5. The appellant also filed supplementary grounds of appeal through **Maragia Ogaro & Co. Advocates** dated 5th April, 2016. They state that the court wrongly applied the doctrine of recent possession; that the appellant was not properly identified and that the charge sheet was defective; that there was discrepancy in prosecution evidence on the place and date of recovery of the stolen items and that the court held that there was loss of life when no evidence had been led to that effect. The final ground was the court did not consider the circumstantial evidence that was favourable to the appellant.

6. At the hearing of the appeal, **Mr. Maragia** learned counsel for the appellant submitted that there was no proper identification of the appellant. That the evidence of identification given by PW6 was weak and no identification parade was conducted. On the recovery of the stolen goods, counsel submitted that there was inconsistency on where the items were recovered and that the goods were not positively proved to belong to the complainant. Finally, counsel submitted that the *alibi* raised by the appellant was not rebutted by the prosecution.

7. The appeal was conceded by the state. At the hearing of the appeal on 6th March, 2017, **Mr. Motende** learned counsel for the Republic made extensive submissions on why he was conceding the appeal. On ground 3 of the supplementary grounds of appeal, respecting recovery of the stolen items, counsel submitted that the complainant did not prove ownership of the items. On ground 4 respecting identification, he submitted that there was no proper identification of the appellant. The only witness (PW6) who was said to have identified him at the time of

arrest, testified that he saw two men run away.

8. With respect to the inventory of recovered items, counsel submitted that the allegation that the appellant was forced to sign the inventory was not interrogated by the court. He further submitted that the said exhibits (stolen items) were not produced in court and no reason for not producing them was given. Finally, counsel submitted that the investigation officer who became a hostile witness destroyed the credibility of the prosecution case.

9. The appeal was conceded. However I am conscious of my duty as an appellate court to satisfy myself that the appeal is indeed merited. To do so, I must re-evaluate the evidence afresh to arrive at my own conclusions. **See Okeno –Vs- Republic (1972) E.A. 32; Kinyanjui –Vs-Republic KLR 2004 (2) 364.**

10. I have considered both the record of appeal and the submissions of counsel. The main issue in this appeal is whether or not the case against the appellant was proved beyond reasonable doubt. Related issues as stated in the grounds of appeal are whether the appellant was properly identified and whether the recovered goods were positively proved to belong to the complainant.

11. There is no doubt that the complainant was robbed of his car registration No. KBS 866T Toyota Hilux Double Cabin. There was credible evidence to back the allegation. He testified that he had met the 2nd accused and after drinks gave her a lift to her home at London Estate on the way to his home at Section 58 Nakuru. That when he stopped to drop off the lady (2nd accused), he was accosted at the gate by two men. They took from him 2 ATM cards and a Samsung S2 phone. At his house, they took the key from him and the two men entered the house leaving the 2nd accused to guard him. They loaded the car with various household goods namely, 2 microwaves, T.V set, radio, Zuku decoder, blonde carpet, perfumes and cash and thereafter, drove him around. The complainant further testified that the robbers forced him to drink a liquid which made him black out. He later escaped when the vehicle slowed down at a bump. His car which was fitted with a car track was tracked by the police and was recovered miles away in Kapsabet. The photographs of the vehicle were produced in court.

12. Evidence of identification of the appellant was given by the complainant, PW2 and PW6. It is this evidence that I must scrutinize to see if the accused was properly identified. In this respect the caution by the **Court of Appeal in Wamunga V. Republic (1989) KLR 424** is apt. The Court stated this:-

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."**

13. The complainant testified that the incident happened around 10.00p.m. He said that when he stopped the car for the 2nd accused to alight he "was attacked by two people one of whom looks like the accused at the dock." Clearly this could not be sound identification unless it was corroborated by other identifying evidence. This is because the incident occurred suddenly and at night making the circumstances not favourable for identification**. In Abdalla Bin Wendo .Vs. R (1953) 20 E.A. 166** the predecessor court of appeal expressed itself on this issue thus:

> **"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility or error."**

14. The other evidence of identification was given by PW2 who was the investigating officer. All he said respecting the identification of the appellant was that the appellant and his co-accused were arrested at Kapsabet by Administration Police (AP) officers. He did not record any statement from the said officers. He only stated that once arrested, the appellant was brought back to Nakuru where he led police officers to his house where stolen items were recovered. I observe however that PW2 was declared a hostile witness by the court upon the application of the state which felt that he had been compromised in the case.

15. The only other witness that tried to identify the appellant was **PW6** one **Rasto Kipkoech**. He told the court that he was an athlete and was on a road in Kapsabet at about 9.00a.m. on 18th October, 2013 when he saw a motor vehicle registration No. KBS 866T which was dangerously speeding. That the vehicle turned into a rough road and stopped and two people a man and a woman emerged from it and took off. That he chased after the woman and apprehended her and that the man was also apprehended by members of the public. **PW6** said that the man was beaten by members of the public. He identified both at the dock.

16. I would accept **PW6's** identification of the 2nd accused. He ran after her and arrested her. For the 1st accused (appellant) however, he only saw a man ran away at a distance and later saw a man who had been assaulted by members of the public and being arrested by AP officers. **PW6** could not have been sure that the man who ran away from the vehicle was the same one who was brought back and handed over to the AP officers. His testimony needed other corroborating evidence. His evidence however raises deep suspicion that the appellant was one of the robbers who abandoned the complainant's car and ran off when they realized that police were in hot pursuit and were about to catch up with them.

17. The appellant admitted having been arrested at Kapsabt. He however raised an *alibi* that he was lawfully in Kapsabet at the material time of the robbery and his arrest was a result of mistaken identity. I observed that the investigators found out that the appellant was a prisons officer. Nothing would therefore have prevented them from bringing evidence to rebut the *alibi* raised by the appellant by showing that he was at his duty station in Nakuru at the material time. It is to be recalled that robbery took place in Nakuru.

18. I have also considered the evidence in respect of the recovery of other stolen items. As pointed out by the appellant counsel and admitted by the respondent's counsel, the evidence in that respect was full of contradictions. It was said that the appellant led the police to his house in Nakuru where the items were recovered. On the other hand, the complainant says that he saw the items at the police station, while the appellant says that he was forced to sign an inventory. More critically, none of the items were produced in court and positive possession was not proved.

19. It is clear from the evidence that the identification of the appellant partly depended on circumstantial evidence. However the chain of circumstances was broken. As it is he was not arrested while in possession of the car and none of the members of the public who pursued him when he ran away from the car was called to testify. The complainant on the other hand had had only a fleeting sight of him and did not know him before. This analysis leads me to the finding that the identification of the appellant was not water tight.

20. In the premises, I find and hold that the conviction of the appellant was unsafe. The charges against him were not proved beyond reasonable doubt. I quash the conviction and sentence imposed by the trial court. The appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment delivered, dated and signed this 20th day of March, 2018

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Maragia for the Appellant

Mr. Motende/Mr. Chigiti for respondent