HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.90 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. S. Nyalan'o – SRM delivered on 21st July 2017 in Makadara CMC. CR. Case No.1902 of 2015)

JOHN AMBASA KILUMBI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant, John Ambasa Kilumbi was charged, with others, with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code.** The particulars of the offence were that on the night of 14th June 2015 at Kayole Posta in Embakasi East District, Nairobi County, the Appellant, jointly with others not before court, robbed Urbanus Kyalo Mbuvi of a wallet containing his identity card, ATM card, airport driving permit, job card and Kshs.2,000/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Urbanus Kyalo Mbuvi (hereinafter referred to as 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. He has appealed to this court.

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 did not stand up to legal scrutiny. He faulted the trial magistrate for convicting him on the basis of unsustainable circumstantial evidence that did not and could establish his guilt. He was of the view that if the trial court had interrogated the circumstances of his arrest, it could have reached a different verdict that he was not at all involved in the robbery. He was finally aggrieved that his defence was not taken into consideration before the trial court reached the impugned judgment convicting him as charged. 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 the court written submission in support of his appeal. He submitted that he did not understand why he was charged and subsequently convicted for an offence that he did not commit. He urged the court to allow the appeal. Ms. Aluda for the State conceded to the appeal. She submitted that the evidence of identification that was adduced by the prosecution witnesses was not watertight nor was it sufficient to establish the guilt of the Appellant to the required standard of proof. She explained that it appeared that the trial court was influenced by the evidence of the investigating officer who purported to have given evidence of an alleged confession which, if indeed it was a confession, was not taken in a manner envisaged by the law. In the circumstances, she was not opposed to the appeal being allowed by the court.

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)".***

The issue for determination by this court is whether the prosecution adduced sufficient culpatory evidence to establish the Appellant's guilt on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, this court has considered the submission made by the Appellant and by Ms. Aluda for the State. It has also read the proceedings and the judgment of the trial court. It was clear from both the submission and proceedings that the trial court convicted the

Appellant on the sole evidence of identification. The complainant testified that he was accosted by a gang of five robbers at about 10.00p.m. as he was returning home from work. He testified that when he reached the gate of his house, he was hit on the neck, fell down, before he was robbed of his wallet containing his documents and Kshs.2,000/-. He told the court that he identified the Appellant in the course of the attack. He did not tell the court how he was able to positive that he had identified the Appellant as the person who robbed him.

Although he testified that he was able to see the five robbers using the security light from a nearby flat, it was not clear from his evidence how he was able to see the physical and facial features of his attackers in the hectic circumstances of the robbery. The complainant did not make a report to the police until the following day when he was informed that a suspect had been arrested. He did not give a physical description of his assailants in the first report that he made to the police. This court cannot therefore verify the evidence of identification given by the complainant because it was not possible to believe the complainant when he said that he positively identified the Appellant as being among the gang that robbed him.

The circumstances of the Appellant's arrest also raises doubt that he participated in the robbery in question. The Appellant was apprehended by members of the public who took him to the police. The members of the public accused him of being a member of the gang that terrorized them. None of the members of the public was called upon to give evidence in court to explain under what circumstances they suspected or they thought the Appellant was a member of the gang that robbed the complainant. The investigating officer's testimony was not helpful at all in regard to illuminating to the court the circumstances of the Appellant's arrest and why he formed the opinion that there was sufficient evidence to have the Appellant charged with the offence.

It was clear from the judgment of the trial court that the court did not consider the fact that the evidence of identification adduced by the complainant was that of a single witness purporting to make an identification in circumstances that were clearly difficult and did not favour positive identification. In **Maitanyi –Vs- Republic [1986] KLR 198** the Court of Appeal held at P.200:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> ***"Subject to 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 greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a 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 of error".***

It was evident to this court that the trial court did not warn itself of the danger of relying on the evidence of a single identifying witness, especially when the circumstances the identification was alleged to have been made was not conducive for positive identification.

On re-evaluation of the evidence of identification adduced by the complainant, it was clear to this court that the same was not sufficient nor was it so watertight as to exclude the possibility of mistaken identity. It was apparent to this court that the trial court may have been influenced by the evidence adduced by the investigating officer who alluded to an alleged admission of guilt by the Appellant upon his arrest. There was no other evidence that was adduced by the prosecution witnesses to connect the Appellant to the commission of the crime. The State, correctly in this court's view, conceded to the appeal.

In the premises therefore, the Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is quashed. The death sentence that was 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 8TH DAY OF MARCH 2018

L. KIMARU

JUDGE