REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 13 OF 2017

MOHAMMED ALI BAKARI.....APPELLANT

-VERSUS-

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. E. Muriuki Nyagah, Principal Magistrate in Migori Chief Magistrate's Criminal Case No. 578 of 2016 delivered on 04/05/2017)

JUDGMENT

1. **Mohammed Ali Bakari,** the appellant herein, was charged before the Chief Magistrate's Court at Migori on 08/08/2016 with two counts being **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** and **Personating a Public Officer** contrary to **Section 105(b)** of the **Penal Code.**

2. The particulars of the offences were as folows: -

Count 1:

On the 28th day of July 2016 at about 0939 hours in Nyatike Sub-County within Migori County in the Republic of Kenya jointly with one not before court, being armed with dangerous or offensive weapon namely knife, rungu(matchette) robbed SALIM NABROOK OLOO mobile phone make Techno (Y-7) valued at Ksh. 12,500/= and cash money Kenya Shillings 14,250/=.

Count 2:

On the 28th day of July 2016 at about 0939 hours in Nyatike Sub-County within Migori County in the Republic of Kenya, falsely presented himself to be a person employed in the public service namely a police officer and assumed to arrest (or search) SALIM NABROOK OLOO.

3. The appellant denied the said charges and a trial took place whereupon the appellant was found guilty of the first count of robbery with violence and was convicted. He was sentenced to suffer death on 04/05/2017. The appellant was however acquitted on the charge of personating a Public Officer.

4. The prosecution availed 5 witnesses in support of the charges. The complainant testified as **PW1**. Two arresting officers testified as **PW2** and **PW3**. They are **No. 92430 PC Ahmed Bashir** and **No. 49440 PC John Ruto** respectively. **PW4** was the investigating officer **No. 79669 Corporal John Kirui** while one **Daniel Otieno** testified as **PW5.**

5. Being dissatidfied with the conviction and sentence, the appellant preffered an appeal by timeously lodging a Petition of Appeal on 10/05/2017. He preferred five grounds which were tailored as follows: -

"1. THAT I pleaded not guilty to the charge before the court.

2. THAT the learned hearing court erred both in law and facts by drawing judgments upon fraudylent proceedings.

3. THAT the learned heraing court erred in law and facts by not considering elements of law that constitute the nature of the offence ie Robbery with Violence before the Court.

4. THAT the leraned hearing court ered in both law and facts and deed by convicting appellants and awarding a Death sentence in a case as this that require relevant Exhibits to corroborate claims of the complainant.

5. THAT the learned hearing court failed in law ad faith to recognise that the eviences were obtained in unfair manner thus turning theprocess of the court not to serve the purposes of persuing the course of criminal justice but to embarras and degraded the appellant."

6. The appeal was heard by way of written submissions which were highlighted on. The appellant's main submissions were that the judgment was drawn from fraudulent proceedings, that the ingriedients of the offences were not established, that the evidence was contradictory, that the defence was not properly considered and that there was need for an identification parade to be conducted. The appeal was opposed.

7. As this is the appellate Court of first instance, its role is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. In determining whether the appellant committed the offence of robbery with violence as charged and convicted, this Court will deal with the ingredients of such offence, but first the cardinal issue of identification.

9. Since the record has it that the offence was committed at night and PW1 did not know the appellant before, I will revisit the general legal guidelines on identification of assailants.

10. It has been held, times without number, that identification of assailants must be carefully handled, even in cases of recognition, since even very close people may be mistaken to each other and as such cause grave injustice to an accused moreso when one is facing a capital offence. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

11. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. In **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

12. The above does not mean that there cannot be safe identification or recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

13. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

14. I will now look at the evidence. According to PW1, he was attacked on 28/07/2016 at around 09:30 am behind a bar called West Gate Club in Nyatike. He was confronted by two men who grabbed him from behind as another one appeared from the front armed with a knife and who wore a black maven and threatened to stab him. He was hit from behind, fell and was held on the ground by another person. He was robbed of his personal belongings and as he screamed for help the attackers disappeared. PW1 stated that he managed to clearly see the attackers with the aid of the security lights from the bar which were about 3 metres away. PW1 went home and reported the matter to the

police the following day as he also went to hospital. To PW1, the ordeal took 20 minutes and he identified the one who was armed with the knife as the appellant.

15. Closely linked with the foregone is the evidence of PW5. He stated that on 28/07/2016 at around 09:00pm as he left the West Gate Club he met two people outside the bar armed with a rungu and a knife. He safely passed them. He then heard people fighting behind him and returned. He returned and saw the two people he had just passed fighting PW1. He then ran away. He identified the appellant as the one who had a rungu with the aid of the security lights which were about 10 metres away and who wore a maven. On cross-examination, PW5 confirmed that the appellant held a rungu but he did not know the person who was assaulted. That, he only heard that PW1 had been assaulted. That, he ran away as he was almost becoming a victim too. That, he returned to the scene where he witnessed the fight after some commotion. That, there were many other people also working around the bar at that time. However, on re-examination, PW5 stated that he saw the appellant assaulting the PW1 as he left the bar.

16. It is the foregone evidence that is to be weighed against the legal parameters stated above. One thing which strikes out in the evidence of PW1 and PW5 are the inconsistencies. The way PW1 described the incident is completely different from how PW5 described it for instance the allegation by PW1 that the incident took place at 9:30am and behind the bar to that by PW5 that it took place in the night and in the front of the bar. I have noted that even the charge sheet indicated the time of the incidet as 0930hrs meaning that it was daytime. From the way PW1 stated he was attacked and held helplessly on the ground by three armed people at the back of the bar to the way PW5 said it was only a fight after a commotion in front of the bar. PW5 kept on changing his position on many aspects including whether PW1 was actually assaulted. There was also the issue as to what the appellant allegedly carried. According to PW1 the appellant was armed with a knife whereas according to PW5 the appellant had a rungu. The scene was 3 metres from a security light according to PW1, but according to PW5 it was 10 metres away from the security lights.

17. PW5 stated that there were many people around the bar that time. PW1 also stated that he screamed and the attackers left. PW1 however proceeded home and only reported the incident the following day. Did any one answer the call of rescue by PW1 in the 20-minutes ordeal?

18. Another critical issue which avails itself is whether the circumstances of this case called for an identification parade to be conducted. The appellant was allegedly in a maven. A black maven and at night. The attack was abrupt. PW1 was allegedly held by two people from the back and he was hit from behind with a club. He fell on the ground. Further, one of the attackers came from the front and threatened him. PW1 must therefore have been struggling to free himself from the attackers and given that it was at night; was it really possible that PW1 would, in such a state sufficiently look at the one who came from the front and even recognize him later? I do not think so. Given that it was the first time PW1 saw the appellant and in those circumstances, then it was imperative that an identification parade be conducted otherwise the dock identification is rendered worthless. (See the Court of Appeal decision in **Gabriel Kamau Njoroge vs. R (1982-88) 1 KAR).**

19. From the analysis of the evidence in this case and on the guidance of the various judicial decisions, I am unable to find that the identification of the appellant herein was safe and free from error. I respectfully disagree with the learned Magistrate's finding that the appellant herein was properly and safely identified as the perpetrator of the alleged offence. In fact what comes out tends to support the contention by the appellant that he was engaged in a misunderstanding with PW1, had a commotion and nearly fought. I hence agree with the appellant that his defence was not carefully considered. PW1 must have pressed the charges against the appellant to settle scores. They were false charges and the appellant was just framed up.

20. Having found that the appellant was not properly identified as the imaginary attacker, a further deliberation on the other issues will not be of any importance to this appeal. I choose not to take that route.

21. I hereby allow the appeal, quash the conviction and set aside the setence. The appellant is forthwith set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of April 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mohammed Ali Bakari - Appellant in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Prosecutor.

Miss Nyauke – Court Assistant.