



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 143 OF 2017**

*(An Appeal arising out of the conviction and sentence of Hon. M.A. Opondo – SRM*

*delivered on 22<sup>nd</sup> September 2017 in Makadara CMC. Cr. Case No.1525 of 2014)*

**EDWIN MOGAKA NYAYIEMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Edwin Mogaka Nyayiemi was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 14<sup>th</sup> January 2014 at Kariobangi North Estate in Nairobi County, the Appellant, jointly with others not before court while armed with dangerous weapons, namely a pistol and knives, robbed Markus Otieno Okello of Kshs.8,000/-, a mobile phone make Nokia X2 all valued at Kshs.15,000/- and at the time of such robbery used actual violence to the said Markus Otieno Okello (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 charge. He was sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal 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 evidence of identification that was made in circumstances that were not conducive for positive identification. He asserted that he was a victim of mistaken identity. He faulted the trial magistrate for relying on inconsistent, contradictory and extraneous evidence to convict him. In particular, he faulted the trial magistrate for relying on medical evidence that did not support the charge that was brought against him. He was aggrieved that crucial witnesses were not called to testify in the case and thus prejudiced him. He took issue in the manner in which the trial court failed to take into consideration the circumstances of his arrest, which in his view, was a clear pointer that he was not involved in the robbery. He complained that his right to fair trial as provided under **Article 50(2)(c)** and **(j)** of the **Constitution** was breached in that crucial witnesses were not produced in court by the prosecution. He faulted the trial magistrate for failing to consider that his rights under **Section 200** of the **Criminal Procedure Code** were not upheld thereby occasioning miscarriage of justice. He was finally aggrieved that his defence was not considered before the trial magistrate reached the impugned verdict. 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 also made oral submission urging the court to find that the prosecution had failed to establish a case to entitle the trial court to convict him. Since the basis of the prosecution's case was the evidence of identification, the Appellant submitted that the circumstances in which the robbery is said to have taken place, created doubt that the complainant had identified him as the assailant. Ms. Atina for the State conceded to the appeal. She submitted that the evidence adduced by the prosecution witnesses did not establish the Appellant's guilt to the required standard of proof. She observed that the trial court had relied on evidence which had been set aside when an order was issued that the case starts *de novo*. She further stated that the evidence adduced by prosecution witnesses was contradictory and inconsistent and therefore could not sustain a conviction. In the premises therefore, she did not support the conviction of the Appellant.

Before giving reasons for its determination, it is imperative that the facts of this case be set out. The complainant in this case told the court that he was accosted by a gang of robbers on 14<sup>th</sup> January 2014 at about 9.00 p.m. when he was walking back to his house after he had escorted visitors to a nearby bus stage. He testified that he was confronted by a gang of six young men who had dressed in black jackets. They were armed with knives. They ordered him to lie down after they threatened him with a pistol and knives. He resisted. He was stabbed in the stomach with a knife. He was robbed of his Nokia X2 phone and Kshs.8,000/-. He was left for the dead. His sister PW2 Christine Awuor testified that on material day at about 11.00 p.m., she was informed that his brother, the complainant had been beaten by thugs. She went to the scene and found the complainant lying unconscious by the roadside. He was bleeding from a wound on his abdomen. She sought and got assistance to rush the complainant to the Kenyatta National Hospital where he was admitted, treated and later discharged.

The complainant gave contradictory testimony in regard to how he was able to be positive that he had identified the Appellant as being in the gang that robbed him on the material night. He testified that at the place that he was robbed, there was security light. He testified that although the robbers wore hoods, he was able to recognize the Appellant as he had previously known him. However, he did not tell the court how he had previously come to know the Appellant. He did not give this information to the police in the first report that he made to the police. He did not give the description of the robbers in the first report that he made to the police. When he was cross-examined by the Appellant, he was unable to categorically state how he was able to identify the Appellant during the course of the robbery. What emerged from his testimony is that several weeks after he had been discharged from hospital, a woman purporting to be the mother of the Appellant paid him a visit and allegedly told him that the Appellant, her son, was in the gang that robbed him. Unfortunately, this woman was not called to testify as a witness in court by the prosecution. The failure by the prosecution to call this witness raised doubt as to the veracity of the complainant's story. The complainant's assertion in that regard amounts to hearsay evidence.

The circumstances of the Appellant's arrest also raise doubt that he was the one who had robbed the complainant. PW3 PC Richard Ratemo then based at Kariobangi Police Station, testified that on 25<sup>th</sup> March 2014, while he was at the crime office, the Appellant was brought in by two police officers who were on patrol. Unfortunately, the two police officers who arrested the Appellant were not called as witnesses in the case. PW3 testified that he had information that the Appellant was a member of the gang that robbed the complainant. From his testimony, it was apparent that this information was given to him by the complainant after the woman who claimed to be the Appellant's mother had visited the complainant and allegedly implicated the Appellant in the offence. PW3 testified that when the Appellant was initially arrested, the police intended to charge him with the offence of **preparation to commit a felony** until the complainant stepped in and gave the information that led to the Appellant being charged with the more serious offence of **robbery with violence contrary to Section 296(2) of the Penal Code**.

When the Appellant was placed on his defence, he denied that he committed the offence. He narrated the circumstance of his arrest on 26<sup>th</sup> March 2014. He told the court that he was arrested while leaving his place of employment. At the time, he worked in a bar called Migingo. He was arrested by three police officers who accused him of being a member of a gang that was robbing people. He was taken to

Kariobangi Police Station and was shocked when he was confronted with the allegations that he had robbed the complainant in this case. He pleaded his innocence and urged the court to dismiss the case against him.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be conscious of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make comments regarding the demeanor of the witnesses (See **Okeno –vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution established its case, to the required standard of proof beyond any reasonable doubt, to secure the conviction of the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

This court has re-evaluated the evidence adduced by the witnesses before the trial court. It has also considered the submission made by the parties to this appeal. As earlier stated in this judgment, the prosecution relied on the sole evidence of identification to secure the conviction of the Appellant. The identification was that of a single identifying witness made in difficult circumstances. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 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:-*

*“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”.*

In the present appeal, the only witness who testified implicating the Appellant in the robbery was the complainant. From his testimony, it was clear that the circumstances in which the said robbery took place cannot, by any stretch of imagination, be described to be conducive for positive identification. The robbery took place at night. Although the complainant stated that there were security lights at the scene of the robbery, this fact was negated by his further evidence when he testified that the robbers wore hoods and were six in number. In the hectic circumstances of the robbery, and the complainant having been injured in the course of the said robbery, it is unlikely that the Appellant was able to positively identify any of his assailants. The complainant did not give the description of his assailants in the first report that he made to the police. Indeed, the police would have not taken action against the Appellant were it not for the fact that the complainant claimed that a woman purporting to be the Appellant's mother confessed to him that the Appellant had been involved in the robbery. Unfortunately, this woman was not called as a witness by the prosecution. Her evidence would have been crucial to corroborate the complainant's testimony as to the circumstances of the alleged confession.

The circumstances of the Appellant's arrest further raises reasonable doubt that the Appellant participated in the robbery. The Appellant was arrested by police on patrol. He was taken to the police station. The police intended to charge him with the offence of **preparation to commit a felony**. Fortunately, one of the police officers at the crime office recalled that a report had been made implicating the Appellant in the robbery. This was three months after the robbery incident. This court is not persuaded that the prosecution adduced sufficient culpatory evidence to connect the Appellant to the robbery. Ms. Atina for the State, correctly in the view of this court, conceded to the appeal.

In the premises therefore, the appeal is allowed. The Appellant's conviction is quashed. He is acquitted of

the charge. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.  
It is so ordered.

**DATED AT NAIROBI THIS 29 DAY OF MAY 2018**

**L. KIMARU**

**JUDGE**