REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 174 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalango – SRM delivered on 28th October 2016 in Makadara CMC. CR. Case No.3413 of 2013)

ELIJAH OTIENO ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Elijah Otieno Onyango 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 17th July 2013 at Kariobangi North Estate in Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely knives and pangas, robbed Meshack Wasonga Guga (the complainant) of Kshs.5,000/- and a Samsung mobile phone and at the time of such robbery used actual violence to 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. He was aggrieved by his conviction and sentence. 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 prosecution's evidence that did not muster the required standard of proof. The Appellant complained that he was convicted despite the fact that none of the robbed items were recovered in his possession and after the trial court had shifted the burden of proof from the prosecution to the defence. The Appellant was aggrieved that the trial magistrate had failed to consider the fact that no investigations were actually carried out to support the complainant's assertion that it was the Appellant who had robbed him. He was finally aggrieved that he had been convicted on the basis of the evidence of identification that was doubtful and could not rule out the possibility of error. 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, this court heard oral rival submission made by Mr. Ombwayo for the Appellant and Ms. Kimiri for the State. Mr. Ombwayo submitted that the evidence of identification that was relied on by the prosecution did not establish that indeed it was the Appellant who had committed the offence. He submitted that the circumstances, in which the robbery took place, precluded the assertion by the complainant that he had recognized the Appellant as one of the assailants who robbed him. Learned counsel pointed out the inconsistence between the testimony that the complainant testified in court and the first report that the complainant made to the police.

In particular, he stated that whereas in the first report the complainant alleged that he was attacked by five (5) thugs, in his testimony before court, he told the court that he was attacked by two (2) assailants. In the first report, he did not tell the police the identity of the persons who robbed him. In his evidence, he told the court that he was robbed by the Appellant who was known to him prior to the robbery incident. In fact, he referred to the Appellant by his name – Elijah. The complainant testified that the accomplice was one **'Kevo'**. He questioned why the complainant did not give this report to the police when he made the first report. He urged the court to interrogate the circumstances of the Appellant's arrest. The OB Report indicated that the Appellant was arrested, with others, for preparing to commit a felony. How the intended charge morphed into robbery with violence was a pointer that the Appellant had been framed with the charge. Learned counsel urged the court to find that the inconsistencies and contradictions in the prosecution's case clearly lead to the conclusion that there was reasonable doubt which should have been found in favour of the Appellant. He urged the court to allow the appeal.

Ms. Kimiri for the State opposed the appeal. She submitted that the Appellant was recognized by the complainant when he robbed him, in company of another, on the morning of the material day. The complainant and the Appellant were previously neighbours and therefore there was no doubt that the complainant had recognized the Appellant during the robbery. She urged the court not to be persuaded by the OB entries related to the case but rather to be convinced by the evidence that was adduced before court which established to the required standard of proof that it was the Appellant who robbed the complainant. She pointed out that there was sufficient light at the scene of the robbery. The Appellant interacted with the complainant at close quarters to enable the complainant be certain that he had recognized him. The Appellant was also recognized by two other witnesses who were also at the scene. In her view, the evidence of identification was watertight as to

exclude the possibility of any error. As regard sentence, she submitted that there were aggravating circumstances that necessitated either the death sentence or life imprisonment to be imposed on the Appellant. This is because the complainant was seriously injured during the course of the robbery. She urged the court to disallow the appeal.

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 by this court is whether the prosecution established the case against the Appellant 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.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. It was clear from the evidence and the arguments made on this appeal that the Appellant was convicted on the evidence of identification. The complainant testified that on the material day of 17th July 2013 at about 5.00 a.m., he was accosted by a two-man gang as he was walking towards where he had parked the matatu motor vehicle that he was employed to drive. The complainant told the court that he was confronted by the Appellant whom he referred to as Elijah, cut with a panga on his head and robbed of Kshs.5,000/- and his mobile phone. The complainant told the court that he had known the Appellant since 1999 because they used to live together as neighbours with his parents. He described the clothes that the Appellant allegedly wore during the robbery. He stated that the Appellant was accompanied by one **'Kevo'**. He did not know the said Kevo. When he was cut with a panga on his head, he screamed alerting his wife PW2 Dorcas Wambui Mukoya and PW3 Everlyne Akinyi, a neighbour who came to the scene. They also testified that they identified the Appellant as the assailant because he was known to them prior to the robbery incident. In their testimony they referred to him as Elijah.

After the robbers had left the scene, the complainant was rushed to Mama Lucy Kibaki Hospital where he was treated and discharged. According to PW7 Dr. Elver Mhabazi, then based at Mama Lucy Kibaki Hospital, the Appellant was brought to the hospital on 17th July 2013. He had been cut with a panga. He had a deep cut wound on the back of his head and on his forehead. The cut wound was stitched and bandaged. He was discharged. The medical report and the P3 form prepared by PW4 Dr. Joseph Maundu based at the Police Surgery were produced into evidence. PW4 assessed the degree of injury as harm.

The Appellant was arrested on 22nd July 2013 by a police who had conducted a swoop in the area where the Appellant resided. The OB report indicates that the Appellant and his accomplices were to be charged with the offence of preparation to commit a felony. The complainant made the report to the police at Kariobangi Police Station at 1.20 p.m. on the same 17th July 2013. This is the OB report that was recorded:

> ***"Report made: now reporting at the police station reporting (sic) is one male adult namely Meshack Guga c/o tel…a resident of Kariobangi Kanyama area and submits a report that today at around 05.30 hours while on his way to job was confronted by a group of five (5) thugs who robbed him of Kshs.5,000/-, a mobile phone make Samsung valued at Kshs.800/- and further assaulted him and cut him several times on the head. Now seeks police assistance and is advised accordingly."***

The Appellant argues that if the complainant was certain that he had recognized him during the robbery, nothing would have stopped him from giving his name to the police when he made the first report.

On re-evaluation of the evidence, it was clear to this court that there was evidently a contradiction between the evidence that the complainant adduced in court and the first report that the complainant made to the police. This court agrees with the Appellant that common sense would have dictated that the complainant identifies the Appellant in the first report that he made to the police. Secondly, the Appellant, in the first report, told the police that he had been attacked by five (5) thugs. Yet in his evidence before court, he said that he was attacked by two men. It is trite that the memory of a victim of a crime is fresher at the time of reporting the incident to the police as compared with the time he is testifying before court. In the present appeal, the statement that the complainant gave in the first report that he made to the police is at complete variance with the evidence that he adduced before court. This raised reasonable doubt that the complainant identified the Appellant during the robbery. This court noted that the robbery took place at 5.00 a.m. Although the complainant testified that there was sufficient light that enabled him to identify the Appellant, he also testified that when he was confronted and cut with a panga, he lost a lot of blood and shortly thereafter lost consciousness. It cannot be ruled out that in the hectic circumstances of the robbery, the complainant could have been confused that he had identified the Appellant as the robber.

The circumstances of the Appellant's arrest also raise reasonable doubt that the Appellant robbed the complainant. The Appellant was arrested on 22nd July 2013, six days after the robbery incident on allegation that he had committed an unrelated offence. The OB report clearly indicates the offence that the Appellant had allegedly committed. It was not clear from the evidence adduced by the prosecution witnesses, particularly that of the investigating officer, how the Appellant came to be charged with the current offence when he was arrested for allegedly committing a completely different offence. Reasonable doubt was raised that the Appellant was indeed the person who robbed the complainant.

No other evidence was adduced to corroborate the evidence of identification. In the absence of such evidence, this court is guided by the Court of Appeal decision of **Maitanyi -vs- Republic [1986] KLR 198**, cannot sustain the conviction of the Appellant. The Court of Appeal in **Francis Muchiri Joseph -vs- Republic [2014] eKLR** held that where a complainant testifies that he recognized the assailant in the course

of the robbery, as such complainant failed to name the assailant in the first report that he made to the police, then such evidence ought to be treated with caution. This is what the court held:

> "***The only issue raised in this appeal is one of identification of the Appellant by Alice through recognition. It was only Alice who testified that she recognized the Appellant and gave his name to the police when she reported the robbery. This is the crux of this appeal that turns on the point of law of whether there was positive identification of the Appellant through recognition. In the case of Wamunga –vs- Republic [1989] KLR 424 this court while dealing with the complexities of an identification stated as follows:-***
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> ***"It is trite law that where the only evidence against a defendant is evidence of identification of 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 a conviction."***
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> ***The name of the Appellant was however not noted in the occurrence book which was available during trial and was examined in court."***

In the present appeal, this court is unable to find that the prosecution established to the required standard of proof beyond any reasonable doubt that the prosecution witnesses identified the Appellant during the robbery. The prosecution's evidence of identification or alleged recognition is inconsistent and contradictory since the complainant did not mention the name of the Appellant in the first report that he made to the police. This court is not convinced that the subsequent evidence that the prosecution witnesses recognized the Appellant displaces the evidence of the first report where the complainant failed completely identify any of his assailants.

In the premises therefore, this court holds that the appeal has merit. It is hereby allowed. The Appellant's conviction on the evidence of identification cannot stand. Reasonable doubt has been raised that the Appellant was indeed recognized during the robbery. The Appellant's conviction is hereby quashed. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF JUNE 2018

L. KIMARU

JUDGE