REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 56 OF 2016

JOHN MALEVE KITHUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence in **Mutomo Principal Magistrate's Court Criminal Case No. 531 of 2015** by **Zachariah Joseph Nyakundi P M** on **30/08/16**)*

J U D G M E N T

1. **John Maleve Kithuku,** the Appellant was charged with the offence of **Robbery with Violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.** Particulars of the offence were that on **23rd September, 2015** at **2.00 a.m.** at **Kyoani Village, Ikutha Location** in **Ikutha Sub-County** within **Kitui County** jointly with others not before Court while armed with dangerous weapons namely rungus robbed **Fredrick Mulandi Kitili,** one Nokia Mobile Phone make **Nokia 220** valued at **Kshs. 5,999/=,** memory card of **8GB** of **Kshs. 800/=** and cash **Kshs. 12,000/=** all valued at **Kshs. 18,799** and at the time of such robbery used actual violence to the said **Fredrick Mulandi Kitili.**

2. He was tried, convicted and sentenced to suffer death as provided in law.

3. Aggrieved by the conviction and sentence he appealed on grounds that: Circumstances that prevailed did not favour correct identification; evidence adduced was riddled by inconsistencies and contradictions; witnesses testified without the requisite oath being administered; the Appellant's constitutional rights as enshrined in **Article 50(2)(c)(j)** of the **Constitution** were violated; **Section 198** of the **Criminal Procedure Code** was contravened; critical witnesses were not called to testify; **Dr. Sang,** the medical officer/Government Analyst did not testify; the onus of proof was shifted from the Prosecution to the Appellant whose plausible defense was not considered and PW9's evidence that was inadmissible was admitted.

4. Facts of the case were that on the **23rd** day of **September, 2015** PW1 **Fredrick Mulandi** the Complainant herein was at Weekend Bar drinking alcohol from **9.00 p.m.** He was joined at the table by **Kisilu Munguti** and **Maleve.** They continued drinking until late in the night. **Kisilu** was the first to leave and so did other patrons at the bar. He got intoxicated to the extent that he slept at the table. He woke up and left the bar. After walking for about 100 metres he was attacked from behind. He was hit on the head and on checking he believed it was **Maleve.** He lost consciousness and upon regaining the same his pair of socks, cash **Kshs. 12,000/=** a Cell Phone valued at **Kshs. 6,000/=,** and his left shoe were missing. He walked to another club where he slept on the floor (corridor). On the **24th** day of **September, 2015** an individual known as **Mbisi** rang PW7 **No. 78070697 Corporal Bernard Mutisya** and reported that there was a person who was beaten and injured. He advised **Mbisi** to take him to hospital. The reporter informed him that the Complainant was last seen with **Maleve.** Investigations carried out culminated into the arrest of the Appellant who was subsequently charged.

5. When put on his defence the Appellant stated that he was at the bar and after drinking alcohol each one of them left going home. He denied having committed the offence.

6. The Appellant canvassed the Appeal by way of written submissions. He urged that the Complainant alleged that he was attacked by one robber whom he identified as the Appellant but he did not give the name to any person in authority. Relying on the case of **Maitanyi vs. Republic (1986) KLR 198** he stated that evidence adduced was of a single witness but the trial Court did not warn itself of the danger of relying on such evidence to return a verdict of 'guilty'.

7. That circumstances that prevailed at the material time did not favour positive identification. That the Complainant was drunk therefore there was a possibility of making errors in identification. That if the Complainant recognized him (Appellant) there is no way the police would have arrested his two (2) friends PW2 and PW3.

8. Further, he urged that there were inconsistencies in respect of the DNA sampling and profiling that led the learned trial Magistrate reach a finding that the Appellant's shirt was stained by the Complainant's blood. And as such shifted the onus of proof from the Prosecution to the

Appellant; and that no Government Analyst was called to tell the Court how the analysis was done.

9. That there was no indication of which language the interpreter who was present in Court was using therefore the Appellant's rights were violated and he was not served with any witness statements therefore his rights to disclosure of Prosecution evidence were infringed.

10. The State opposed the Appeal. Through learned State Counsel **Mr. Mamba,** the State urged that the Complainant identified the Appellant by help of street lights. A DNA was generated from the Appellant's shirt. It matched that of the Complainant. The piece of wood recovered by PW9 was also examined as it had blood stains and the sentence meted out was correct.

11. This being the first Appeal, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

12. This being a case of Robbery with Violence the Prosecution was duty bound to prove the ingredients of the offence as stipulated in **Section 296(2)** of the **Penal Code** that provides as follows:

> ***"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

13. The attacker in this case used a weapon to hit the Complainant. PW8 **Daniel Mulwa** a Clinical Officer at **Mutomo Health Centre** examined the Complainant who had a deep wound on the right side of his head, a wound on his right face region, left middle finger and index finger. This was evidence that he was wounded at the point of being assaulted.

14. The offence was committed at about **2.30 a.m.** According to to PW6 **Justus Mwanzia** the Bar Attendant, PW4 **Kyambia Kyalo** the proprietor of the bar left him to open the gate for the Complainant and Appellant who were the last patrons in the bar and were asleep at about **2.30 a.m.** It is urged by the Appellant that at that particular time conditions favouring identification were not favourable. Evidence adduced was of visual identification by recognition. In the case of **Republic vs. Turnbull (1976) 3 All ER 549** at **Page 552 Lord Widgery CJ** had this to state:

> ***"Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

15. I do also note that this was a case of identification by a single witness. In the case of **Kiilu and Another vs. Republic (2005) IKLR 174,** the Court of Appeal presided over by **Tunoi, Waki and Onyango Otieno JJA** stated as follows:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be p roved by 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 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 probability of error."***

16. In his testimony the Complainant clearly told the Court that he was intoxicated. He did not tell the Court the amount of alcohol he had consumed. What came out clearly is that he imbibed alcohol to an extent that he could neither walk out of the bar or stay awake. He slept at the table until after **2.30 a.m.** when he woke up that is when the gate/door was opened. The question one would pose is whether in such a state of mind he would tell who assaulted him. He alleged there was electric power at the nearby post but was he able to see clearly. The fact that he was in a questionable state of mind is established by evidence adduced by PW5 **Muthoka Musingi** a shopkeeper at the centre who saw him the following morning, the **24th** day of **September, 2015** at **7.30 a.m.** The Complainant told him that he had been assaulted by people that he did not know. PW5 is the one who reported the matter to the police.

17. PW7 **No. 78070697 Corporal Benard Mutisya** gave the name of the businessman who reported to him about a person who was injured as one **Mr. Mbisi.** According to the information he received the Complainant was last seen with the Appellant. This information was alleged to have been given by the watchman.

18. According to PW9 **No. 101802 P C Njue Daniel** who investigated the case, the Complainant was attacked by a person he knew. What is surprising, however, is why PW2 **Kitonya Mwangangi** was arrested the following day on suspicion that he had participated in the robbery. PW3 **Kisilu Mungoti** just like PW2 who were at the pub but left before the Appellant and Complainant testified that he got information that he was being sought for allegedly robbing the Complainant and he was even arrested.

19. These sequence of events is evidence that at the point of reporting the matter to the police the Complainant was not aware of who had indeed robbed him. Therefore the alleged identification was not cogent.

20. In convicting the Appellant the learned trial Magistrate based his finding on the DNA Report that was adduced in evidence. He stated thus:

> ***"The DNA profile generated from the blue blood stained shirt belonging to the accused and the cream blood stained shirt***

belonging to the complainant matched DNA profile generated from the blood samples of the complainant.

The fact that the accused person shirt had blood stains which when analysed, match the profile of the complainants blood, confirm that indeed, the accused was at the scene of crime and must be the person who attacked the complainant."

21. The report was produced in evidence by PW9. In his testimony he stated thus:

"..... The complainant was found sleeping on the veranda of Kaviku Shop. The complainant was taken to hospital and investigation commenced by Corporal Mutisia. He went to Kaviku who was his employer, he found shoes and shirt, the shirt belonged to the accused. He collected the exhibits. The accused was arrested and taken to Mutomo Police Station. The piece of wood used was collected at the crime scene, it had blood stains, the shirt was also found with blood stains.

I took the exhibits, collected the blood of the accused and complainant. They were taken to the Government Chemist for analysis. It was determined that the blood on the shirt that was recovered belonged to the complainant. The blood on the wood belonged to the complainant.

I recovered DNA results.

I took blood sample in bottle mark on for complainant cream shirt in khaki envelope marked M. For complainant.

Blue shirt in khaki envelop marked N for the accused. Piece of timber in a khaki envelop. Both shirts were blood stained.

DNA generated from both blue shirt and cream shirt and the timber marked all those generated from the blood sample of the complainant.

The report was prepared by Dr. Sang Government analyst. I wish to produced the following exhibit. Exhibit Memo Ex3. DNA result Ex4. Since recovered by corporal Mutisya, found from ventilation in a toilet where he slept that night. Ex5. Blue stained shirt recovered in a black nylon paper Ex6. The shirt was won by the accused. Cream stained shirt collected from the complainant Ex7. Piece of timber, blood stained collected from crime scene Ex8.

The person who was arrested and charged is present in court."

22. In his testimony the Complainant stated that his assailant that he called **Maleve** was wearing a brown sweater. He did not mention a blue shirt. This particular witness did not identify any of the clothes that were subjected to examination at the Government Chemist.

23. The exhibits in question were not recovered by PW9. He stated that the blue shirt alleged to belong to the Appellant was recovered by **Corporal Mutisya** who found it from a vent in the toilet where he allegedly slept. PW7, **Corporal Mutisya's** testimony was silent on this particular allegation. Looking at the report from the Government Chemist, items mentioned were taken to the Laboratory by **No. 75433 P C Japheth Kidiavai** who was not called as a witness. This was the person who could have shed some light on how and where the cream shirt alleged to belong to the Complainant that he never identified and the blue shirt that was alleged to belong to the Appellant were obtained from.

24. The Analysis was done by Analyst **Henry Kiptoo Sang BSC.** This Person was not called to testify.

25. **Section 77(1)(2)(3)** of the **Evidence Act, Cap 80(k)** provides thus:

"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

Article 50(2)(k) of the **Constitution of Kenya, 2010** provides thus:

"(2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and challenge evidence;"

26. The Appellant had a right of challenging evidence adduced by **Mr. Sang.** Having not been availed to testify, it was imperative for the Prosecution to make an application notifying the Court of the intention to produce the document in the absence of the maker. The Prosecution should have laid the basis upon which the document was to be produced. The Court on its part was required to give the Appellant an opportunity of responding to the application with a view of objecting or not to its production. The procedure that was adopted by the Court of letting a police corporal who had not participated in collecting evidence and submitting it to the Government Chemist and

thereafter analyzing it to purport to state what was done by the Analyst and the findings thereto was erroneous. Indeed the Court admitted hearsay evidence that was adduced by PW9.

27. Regarding the language of the Court, there was a Court Interpreter present throughout. In the case of **Said Hassan Nuno vs. Republic (2010) eKLR,** the Court of Appeal stated that:

> ***"We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even the court where it does not understand the language of the accused; or witness to the case."***

The services of the interpreter having been discharged, the Appellant was not prejudiced.

28. From the foregoing, it is apparent that the Complainant (PW1) did not recognize his attacker. Identification having not been cogent and evidence of DNA being questionable, the conviction of the Appellant was unsafe. In the circumstances, I do quash the conviction and set aside the sentence meted out. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

29. It is so ordered.

Dated, Signed and Delivered at Kitui this 31st day of July, 2018.

L. N. MUTENDE

JUDGE