REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 72 OF 2016

EMMANUEL MUKHWANA.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No.5893 of 2013 at the Chief Magistrate's Court, Eldoret (Hon. H. Barasa, PM) dated 13 June 2016)

JUDGMENT

[1] This is an appeal by **Emmanuel Mukhwana** from the conviction and sentence passed against him on **13 June 2016** in **Eldoret Chief Magistrate's Criminal Case No. 5893 of 2013.** He had been charged before the lower court with the offence of Robbery with Violence, contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** He was jointly charged with one **Nelson Mulunga;** and the particulars of the offence were that on the **27th day of December 2013**, at Mlimani Village in Lugari District within Kakamega County, jointly with another not before the Court, while armed with offensive weapons, namely axe, panga and a spear, they robbed **Sammy Ngaa Osome** of one mobile phone make Samsung 622, one white jacket and money in cash of Kshs. 200/=, all valued at **Kshs. 5,700/=** and that immediately before the time of such robbery they used actual violence to the said **Sammy Ngaa Osome**.

[2] The Appellant denied that charge and was taken through the trial process in which the Prosecution called a total of 7 witnesses in proof of the Charge and its particulars. Having heard the Prosecution case, and what the Appellant had to say in his defence, the Learned Trial Magistrate found the Appellant guilty and convicted him of the offence charged, in a Judgment delivered on **13 June 2016**. The Appellant was accordingly sentenced to suffer death as by law provided; and, being aggrieved by that decision, the Appellant lodged this appeal on **17 June 2016,** on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in matters of law and fact in convicting him on a case which was not based on the best evidence rule.
>
> **[b]** That the Trial Magistrate erred in matters of law and fact by failing to frame the issues for determination to enable him to arrive at a reasoned judgment through proper analysis of the evidence on record.
>
> **[c]** That the Learned Trial Magistrate erred in matters of law and fact in not finding that the circumstances of recognition of the Appellant were not conducive and therefore did not meet the required legal standard.
>
> **[d]** That the Learned Trial Magistrate further erred in matters of law and fact by rejecting the Appellant's defence without considering that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

[3] The Appellant thereafter filed Amended Grounds of Appeal pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. He thereby proffered the following Grounds of Appeal:

> **[a]** That the Trial Magistrate erred in law and fact in convicting him without observing that he was not positively identified at the scene of crime;
>
> **[b]** That the Trial Magistrate erred in law and fact by convicting him without ascertaining that the Complainant's first report to the Police contained his name.
>
> **[c]** That the Trial Magistrate erred in law and fact by not appreciating that the case was not proved beyond reasonable doubt.

[d] That the Trial Magistrate erred in law and fact by convicting him on exhibits which were improperly recovered and identified;

[e] That the Trial Magistrate erred in law and fact by failing to notice the prevalent contradictions, inconsistencies, poor and doubtful evidence.

[f] That the Trial Magistrate erred in law and fact by failing to observe that the Prosecution Witnesses were not credible;

[g] That the Trial Magistrate erred in law and fact by convicting him on a fake P3 Form;

[h] That the Trial Magistrate erred in law and fact by relying on a single witness to convict him;

[i] That the Trial Magistrate erred in law and fact by relying on dock identification by recognition to convict him;

[j] That the Trial Magistrate erred in law and fact by failing to notice the prevalent grudge held against him by the Complainant.

[4] On the basis of the foregoing grounds, the Appellant prayed that his appeal be allowed, the conviction quashed, and the death sentence set aside. He urged his appeal by way of written submissions, which he filed herein on along with his Amended Grounds of Appeal**.** The appeal was opposed by **Ms. Kagali**, Counsel for the State, vide her oral submissions made herein on **12 July 2018.** Hence, I have carefully considered the Appellant's Grounds of Appeal, the written and oral submissions made herein. I have also perused the lower court record with a view of re-evaluating the evidence to satisfy myself that the conviction and sentence of the Appellant was premised on sound evidence as required, this being the first appeal. (see **Okeno vs. Republic [1972] EA 32).**

[5] Section 295 of **the Penal Code,** stipulates that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. Further to that provision, **Section 296(2) of the Penal Code**, the provision pursuant to which the Appellant was charged, provides that:

"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."

[6] Hence, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

[a] That the Appellant was armed with a dangerous or offensive weapon or instrument; or

[b] That he was accompanied by one or more other person or persons; or

[c] That immediately before or immediately after the time of the robbery, he wounded, struck or used any other personal violence against the Complainant;

[7] Before the lower court, evidence was adduced by the Complainant, **Sammy Ngaa Osome (PW1),** to the effect that on **27 December 2013** at about 7.20 p.m. he closed his shop and left for home, riding his bicycle. He had a torch in hand to illuminate the way. He stated that, having gone for about 800 metres, he was attacked by some three people who cut him on the head before robbing him of his mobile phone, his jacket and money in cash amounting to **Kshs. 200/=.** He added that the three people, who were well known to him, then covered his head with a lesso before disappearing into a nearby sunflower farm. He raised alarm for help and was thereafter assisted to get to hospital by **Cedrick (PW5);** and subsequently to **Lugari Police Patrol Base** where he reported the occurrence. It was the evidence of **PW1** that he was able to recognize two of the culprits, one of whom he identified to be the Appellant, and whose particulars he provided to the Police. The Appellant was subsequently arrested and charged along with one **Nelson Mulunga,** the 2nd Accused before the lower court.

[8] The Chairman of the Lugari Sub-location Community Policing Committee, **Richard Amela Majengo**, testified as **PW2** before the lower court. His evidence was that he was at home at about 8.00 p.m. when he received information that the Complainant had been attacked and robbed on his way home. He stated that he immediately proceeded to the scene of the robbery where some members of the public had gathered. The Complainant had already been taken to hospital by that time. They then proceeded to the Complainant's shop to check if it had been broken into and found it intact. **PW2** added that the Complainant later found them outside the shop upon his return from the hospital.

[9] It was the evidence of **PW2** that the Complainant gave an account of how he had been robbed and divulged the names of the offenders. He added that they immediately proceeded to the suspects' homes with a view of having them arrested but did not find them. Nevertheless, a search was carried out in the suspects' respective houses; and that from the house of the Appellant, who was the 1st Accused before the lower court, they recovered an axe hidden under the mattress whose handle was wet. From the house of the 2nd Accused a spear was recovered which was thereafter identified by **PW3** as having been taken from his deceased father's house. The two items were produced before the lower court and marked **Exhibits No. 2 and 4.**

[10] On his part, **Dismas Osiko (PW3),** a neighbour of the Appellant, told the lower court that he had engaged the Appellant and the 2nd Accused before the lower court, to dig a pit latrine for him on the **27 December 2013**. He then left for **Webuye;** and that he did not find them upon his return at about 2.00 p.m. He added that he had also instructed the Appellant and the 2nd Accused to help demolish his deceased father's house, a traditional ceremonial requirement in respect of which he had invited some guests. **PW3** further stated that he was surprised to learn that his father's spear, which was in his deceased father's house, the house which was to be demolished in the early hours of the following morning, had been found in the possession of the Appellant. He identified the spear before the lower court as the Prosecution's

Exhibit No. 4; and that it was one of the properties to be formally removed from his father's house before its demolition.

[11] PW4, **Concepta Kilembuli Zachariah**, also narrated to the lower court her encounter with the Appellant and the 2nd Accused on the night of **27 December 2013**. Her testimony was that she was at home at about 7.30 p.m. when the Appellant and the 2nd Accused went there to buy cigarettes; adding that she used to sell cigarettes at her home at the time. She stated that the Appellant had a panga and an axe which he placed at the door; while the 2nd Accused had a spear. It was her evidence that she gave them cigarettes worth Kshs. 70 for which they declined to pay. She said the 2nd Accused punched her on her left cheek when she demanded payment. She thereupon pushed them out and locked the door as they appeared drunk. She further stated that when he got to learn that the Appellant and the 2nd Accused had been arrested for robbing **Sammy (PW1)** while armed with a spear, axe and panga, she went to the Police Station and identified the said items and made her statement in connection with their encounter on the material night.

[12] PW5, Cedrick Atasachi, is the motor cyclist who went to the rescue of the Complainant. He told the lower court that his attention was drawn by **Barnos** to the robbery incident; and that on arrival at the scene, they found **PW1** lying on his belly on the side of the road, drenched in blood. At the scene they found a bicycle, torch and a lesso. He then carried **PW1** on his motorbike to the nearby **Lugari Police Patrol Base** and thereafter to **St. Charles Lwanga Hospital** for treatment.

[13] Evidence was also adduced before the lower court by **Fred Osaka (PW6)**, a registered Clinical Officer based at **Lumakanda District Hospital**. He told the lower court that he examined and treated **PW1** before filling a P3 Form in respect of that examination, which had to do with injuries sustained by **PW1** on the night of **27 December 2013**; and that **PW1** told him he had been assaulted on that night by people well known to him. **PW6** observed that the Complainant had a deep cut wound on the front part of his head and another cut wound on the occipital part of the head; which wounds had been dressed. He classified the injury as amounting to harm. He produced the P3 Form that he filled as the **Prosecution's Exhibit No. 1** before the lower court.

[14] PW7 was the Investigating Officer, **Cpl. Edward Okech**. His evidence was that, while on duty at **Lugari Patrol Base** on the night of **27 December 2013**, he received a report from the Complainant to the effect that he had been attacked, wounded and robbed while on his way home; and that, with the aid of his torch, he was able to see and recognize two people who were well known to him, whose names he gave as **Emmanuel** and **Nelson**. Thus, upon collecting and collating the evidence in the matter, he preferred the Charge of Robbery with Violence against the Appellant and the 2nd Accused before the lower court. He also produced the items he recovered in the course of his investigations before the lower court as exhibits.

[15] The Appellant's defence before the lower court was by way of an unsworn statement. He denied any knowledge of the offence. He also denied that he had anything to do with the axe, panga and spear that were produced before the lower court. He explained that he was at the home of **PW3** where he had been assigned the work of demolishing the house of **PW3's** deceased father, when he was arrested by the Police; and was therefore surprised to be charged with the offence of Robbery with Violence. His defence was that he used to work for the Complainant, and that he lost some money belonging to the Complainant, in respect of which the Complainant threatened to fix him. He posited therefore that the charge and his prosecution before the lower court was a frame-up.

[16] From the foregoing summary, there is no dispute that the Complainant was attacked at about 7.20 p.m. as alleged while on his way home from his shop in Mlimani Village. The Prosecution contention that the attack was by three people who cut the Complainant on the head is uncontroverted. He was taken to hospital and treated for the cut wounds, as was confirmed by **PW6,** who produced the P3 Form that his filled and signed after examining the Complainant as **Exhibit 1**. There is similarly no denying that the offenders were armed with dangerous weapons, with which they wounded the Complainant. Credible evidence was placed before the lower court to show that the violence used on the Complainant was used in order to obtain or retain the Samsung mobile phone, one white jacket and **Kshs. 200/=** in cash, of which the Complainant was robbed on that night.

[17] Clearly therefore all the essential ingredients of the offence of Robbery with Violence were proved before the lower court, noting that proof of any one of the ingredients set out in **Section 296(2)** of the **Penal Code** would have sufficed.(See **Suleiman Kamau Nyambura vs. Republic [2015] eKLR)**. It was shown that the offenders were armed with a dangerous or offensive weapon or instrument; that they were three persons in number and that immediately before the time of the robbery, they jointly cut and wounded the Complainant, thereby causing him bodily harm in the nature of cut wounds on the forehead and back of head. Hence, the only issue to consider herein is whether the Appellant was properly and sufficiently identified as being one of the people who committed the offence.

[18] It is manifest from the lower court record that the Complainant was the only identifying witness. He stated that in the course of the incident, he was able to see and recognize the Appellant and the 2nd Accused before the lower court. Needless to say that the incident occurred at night when it was dark. Accordingly, the Learned Trial Magistrate was obliged test the evidence of identification with greatest care to ensure that it was free from mistake and therefore reliable and safe to support a conviction and to warn herself of the dangers inherent in relying on the evidence of a single witness in difficult circumstances.

Hence, in **R. vs. Turnbull & Others [1973] 3 AllER 549,** it was held that:

> **"...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?**

[19] Similarly, in **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

"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."

[20] It is therefore imperative that the thorough examination be manifest from a perusal of the record; and therefore it bears repeating the wise counsel given by the Court of Appeal in **the Wamunga Case** (supra), that:

"It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect; are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care."

[21] Accordingly, and as would be expected, the Appellant took issue with the evidence of identification that was presented before the lower court. In his detailed written submissions, he questioned the practicality of the Complainant riding a bicycle and at the same time holding a torch **"...to shine his way..."** as was alleged; adding that the Prosecution inexplicably failed to produce the torch before the lower court. In similar vein, the Appellant questioned why the Complainant did not mention his name in his first report to the Police; and urged the Court to find that this was because he was not in a position to see or identify any of his attackers.

[22] The Appellant relied on **Richard Apela vs. Republic [1981] EA 945**; **Ramkrishna Pandya vs. Republic [1957] EA, Feliz L. Ngozi vs. Republic [2006] eKLR** and **Simon Keter vs. Republic [2004] eKLR** among other cases to buttress his submission that it was imperative for the names of the suspect to be recorded in the Occurrence Book when the report was first made to the Police. The Appellant also made mention of what he referred to as prevalent contradictions in the Prosecution Case and urged the Court to find that the case against him had not been proved beyond reasonable doubt.

[23] Starting with the contradictions, several excerpts were lifted from the record of the lower court and relied on by the Appellant to discredit the Prosecution evidence. I have given each of those excerpts careful consideration and noted that some were used out of context to provide a totally different meaning from what was intended by the witness. An example is the quotation from line 12 on page 20 of the Record of Appeal to support the contention by the Appellant that the case was a fabrication. The excerpt reads:

"...we and I threated [threatened] we have you arrested and you were arrested..."

The record however shows that the entire sentence, part of which was carefully omitted by the Appellant reads as follows:

"It is not true you had that my kshs. 700 we and I threatened we have you arrested and you were arrested..."

The original record of the lower court shows that the witness, PW1, denied having threatened to have the Appellant arrested; which is totally different from the meaning ascribed to the statement by the Appellant.

[24] As the above example shows, the obligation of the Learned Trial Magistrate was to take the entire evidence and weigh the same with a view to ascertaining whether it was sufficient to prove the allegations against the Appellant and his co-accused. Hence, having given the evidence a careful consideration, it is indubitable that that corroborative evidence was adduced by **PW2**, one of the first people to arrive at the scene, in connection with the contention by **PW1** that he had a torch to illuminate his way home at the time he was attacked. He stated that on arrival at the scene, the first things he saw were the Complainant's bicycle and a torch. It would have been preferable for the torch to be produced as an exhibit to buttress the Complainant's evidence. However, the mere fact that it was not produced would not, of itself, render that evidence incredible; noting that neither was the bicycle that the Complainant was riding produced, yet there is credible evidence that the Complainant was indeed riding his bicycle when he was attacked.

[25] It is also noteworthy too that the Complainant was consistent in his posturing that he recognized two of the people who robbed him. This is what he told **PW2** and **PW4**. He made the same disclosure to **PW7;** and it was on that basis that the Police immediately went to the Appellant's house to look for him with a view of arresting him. The Appellant was not found at home, but a search that was conducted at his home led to the recovery of an axe; one of the weapons used to wound the Complainant. The axe was hidden under a mattress and was wet; an indication that it had been used and cleaned up shortly before the recovery.

[26] It is to be remembered too that **PW4**, who had no reason to tell the lower court lies about the Appellant, (having bought their piece of land from their family), testified as to how he and the 2nd Accused before the lower court had gone to her house shortly before the robbery incident and that they were carrying the weapons in question; that the Appellant and his companion mentioned to her that they had some work to accomplish that night. It later turned out that the spear had been taken from the house of **PW3's** deceased father in respect of which the Appellant and the 2nd Accused had been engaged for purposes of its demolition. Indeed, it was the evidence of **PW3** that only the Appellant and the 2nd Accused had been allowed access to that house.

[27] Hence, taking into account the totality of the evidence, there was sound basis for the Learned Trial Magistrate to conclude that the Charge had been proved beyond reasonable doubt. It is now trite that a fact in issue, such as identification, may be proved by the testimony of a single witness. (see **Abdulla Bin Wendo & Another vs. Reg [1953] 20 EACA 166** and **Roria vs. Republic [1967] EA 583)**. In this matter, there was credible corroborative evidence to link the Appellant with the offence and therefore lends credence to the evidence of recognition that was adduced before the lower court by the Complainant. It is instructive that in **Anjononi & Others vs. Republic [1976-80] 1 KLR 1566** the Court of Appeal acknowledged that:

"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

[28] In the premises, the failure by the lower court to warn itself of the dangers of basing a conviction on the evidence of a single identifying witness did not affect the overall outcome of the trial. I have similarly given consideration to the discrepancies cited by the Appellant and I am satisfied that their effect would not be such as would vitiate the conviction recorded against him by the lower court. In this regard, I found instructive the Court of Appeal's stand on the matter in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992**, in which the Court of Appeal had occasion to pronounce itself on this issue and held thus:

"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".

[29] Similarly, in ***Philip Nzaka Watu vs. R*** **[2016] eKLR** the Court of Appeal held expressed the view that:

"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

[30] Whereas there is no disputation that, in cases of identification, a witness ought to mention the names of the suspects in their first report to the Police, it has to be borne in mind that the Complainant was in a bad state when **PW5** found him. According to **PW5**, the Complainant was not talking. It is to be remembered too that **PW5** first had the matter reported to the Police before taking the Complainant to the hospital; and that when he was able to talk he mentioned that he knew his attackers, though he did not mention their names. The evidence of **PW2** and **PW7** show that the names were disclosed by **PW1** later that night and the suspects were accordingly apprehended and the weapons that were exhibited before the lower court recovered. Hence, the totality of the evidence does point to the Appellant as one of the people who robbed the Complainant and that the said evidence was free from mistake.

[31] In the result, I find no merit in the Appellant's appeal against conviction. The sentence that was imposed on him is lawful and therefore is accordingly upheld. I would thus dismiss the appeal in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST, 2018

OLGA SEWE

JUDGE