REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 21 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. A. ALEGO – (SRM)

delivered on 27th January 2012 in ELDORET CM CR. Case No.1803 of 2011)

COLLINS KIPRUTO CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Collins Kipruto Chirchir 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 22nd May 2011 at Tachasis Village, in Keiyo Marakwet County, the Appellant, jointly with others not before court, while armed with dangerous or offence weapons namely rungus robbed Reuben Biwott of Kshs.7,000/-, a Nokia mobile phone valued at Kshs.4,000/- and a pair of shoes valued at Kshs.2,500/- and immediately before the time of such robbery injured the said Reuben Biwott. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his amended 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 a defective charge and therefore he was of the view that the subsequent proceedings were defective in substance and were null and void. He took issue with the fact that he was convicted on the basis of inconsistent, contradictory and inadmissible evidence. He was aggrieved that his defence had not been taken into account before he was found guilty of the offence. As regard sentence, the Appellant stated that his mitigation and other relevant factors were not taken into consideration before he was sentenced to a disproportionately harsh and excessive sentence. He was finally aggrieved that his right to fair trial was infringed during trial and at the time he was put on his defence. 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. Marube for the Appellant and by Ms. Oduor for the State. Whereas Mr. Marube urged the court to allow the appeal on the grounds that the Appellant was convicted on the basis of inconsistent and contradictory evidence of prosecution witnesses, which included the testimony of a single identifying witness, who purported to have made identification in circumstances that did not favour positive identification, Ms. Oduor for the State submitted that the prosecution had adduced sufficient evidence which placed the Appellant at the scene of crime, and further, by the fact that some of the robbed items were found in the Appellant's possession so soon after the robbery. She urged the court to disallow the appeal. This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case.

The complainant in this case, Reuben Biwott (PW1) testified that on 22nd May 2011 while he was at Flux Trading Centre, he saw the Appellant at about 6.00 p.m. The Appellant was known to him. It was raining at the time. From his evidence, it was apparent that he shielded from the rain from that time upto 10.00 p.m. when he decided to walk home. While walking home, he was accosted by a gang of robbers who robbed him of Kshs.7,000/- and his Nokia mobile phone. They also took his wallet which contained his personal effects. In the course of the robbery, he was beaten by the robbers. After the incident he walked home and later made a report to Kaptagat Police Station.

On the following day, 23rd May 2011, while PW2 Kenneth Kirwa was at his shop at Flux Shopping Centre, the Appellant, who was known to him, took him a polythene bag that contained some identification and Bank cards. The Appellant told him that the owner would later come and collect them. Later in the day, the complainant went to the shop and was given the documents. The complainant told PW2 that he was robbed on the previous night. He suspected the Appellant. On the same day, PW3 Syrus Korir Kandie testified that he met with the

complainant who told him that he had been robbed on the previous day. He escorted the complainant to Kaptagat Police Station where a report was made. The complainant suspected the Appellant. Accompanied by the police, they went to the Appellant's home at a place called Kapsendui. They found him at home. They arrested him.

PW3 testified that they found the Appellant wearing shoes which the complainant alleged to have been robbed of. They also found him with a wallet which contained the complainant's identity cards. The wallet and the shoes were produced into evidence by the prosecution. The complainant was examined on 24th May 2011 at Chepkorio Health Centre. According to PW4 Michael Kipkoech, a Clinical Officer based at the health centre, the complainant had bruises on his neck and nose. There was tenderness on his thorax and abdomen. He had tenderness on the soles of his feet. He assessed the degree of injury as harm. The weapon used was a blunt object.

The case was investigated by PW5 PC Charles Mwinungo who told the court that the complainant made a report to the police station on 23rd May 2011 at about 3.40 p.m. He issued the complainant with a P3 form. The complainant had a black wallet with personal effects. On conducting investigations, the Appellant was arrested and was found with the complainant's brown shoes. The Appellant was charged with the offence. PW5 testified that the Appellant was arrested by members of the public. Neither the money nor the mobile phone stolen from the complainant were recovered. When he was put on his defence, the Appellant denied involvement in the crime. He urged the court to acquit him.

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 Appellant. 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.

In the present appeal, it was evident that the prosecution relied on two pieces of evidence to secure the conviction of the Appellant before the trial court. The first piece of evidence is that of identification. According to the complainant, he was accosted by a gang of robbers who robbed him of his personal belongings, and in the course of the robbery, injured him. The robbery is said to have taken place at 10.00 p.m. It had just rained. The complainant did not indicate the source of light that enabled him to be certain that he had identified the Appellant as the person who robbed him. It is also not clear from his evidence what facial or physical features of the Appellant made him point him out as the robber. He did not give the description of the clothes that the Appellant wore at the material time. Nor did he say how, during the fateful interaction, he was able to be positive that he had identified the Appellant as one of his assailants.

The incident took place while the complainant was walking home from Flux Shopping Centre. From his testimony, it was evident that there was no artificial light on that road that would have enabled the complainant identify the Appellant. The complainant's testimony was that of a single identifying witness in respect of an identification made in difficult circumstances. In **Suleiman Otieno Aziz –vs- Republic [2013] eKLR**, the Court held thus:

> ***"8. Pursuant to the concerns on the need to ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness, the Kenya Court of Appeal has set out certain guidelines to ensure that a person is convicted only when it is beyond per adventure that he was properly identified. Those guidelines may be found in the case of Cleopas Otieno Wamunga –vs- Republic [1989] KLR 424, as follows:***
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> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification…""***

In the present appeal, it was clear to this court that the trial court did not warn itself of the danger of relying on this evidence of identification before convicting the Appellant while relying on the same. This failure by the trial court may have been overlooked by this court if there was other evidence that supported the finding that it was indeed the Appellant who robbed the complainant. The other evidence however was contradictory and inconsistent. It was apparent that the prosecution sought to rely on the doctrine of recent possession to secure the conviction of the Appellant. It was the prosecution's case that the Appellant was found in possession of shoes and wallet that were robbed from the complainant on the night of the robbery. Other than claiming that the shoes were his property, it was not clear from the complainant's evidence how he was able to be certain that the shoes worn by the Appellant at the material time were his. He did not produce a receipt or show any identifying mark in the shoes that enabled him to be positive that the particular shoes found with the Appellant belonged to him.

As regard the evidence of the recovery of the wallet and the identification documents, the prosecution witnesses gave contradictory evidence. Whereas the complainant testified that the wallet and the identification documents were found in the Appellant's possession, PW3, the shopkeeper told the court that the Appellant took a polythene bag containing the complainant's identification documents to his shop a day after the robbery incident. It was not clear from PW5's evidence where the black wallet was recovered from. From re-evaluation of this evidence, it was clear that the circumstance in which the wallet with the identification documents was recovered was doubtful. The

identification documents could not have been left with the shopkeeper by the Appellant and at the same time recovered in his possession by the complainant.

Again it was not clear from the prosecution's evidence how and where the wallet was recovered allegedly in the Appellant's possession. It was apparent to this court that reasonable doubt was raised regarding the circumstance in which the shoes and the wallet were allegedly recovered in the Appellant's possession. This doubt must of necessity be resolved in the Appellant's favour.

The upshot of the above reasons is that the Appellant's appeal has merit. The prosecution did not adduce evidence that established the Appellant's guilt on the charge brought against him to the required standard of proof beyond any reasonable doubt. The appeal is allowed. The conviction is quashed. The Appellant is set at liberty and ordered released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2018.

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2018

HELLEN OMONDI

JUDGE