REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 29 OF 2017

(Being an Appeal from the Original Conviction and Sentence in

Criminal Case No 1576 of 2015 in the Chief Magistrate's Court,

Naivasha, (E Kimilu – PM)

JOHN NDERITU MBURU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant John Nderitu Mburu and two others were charged with two counts of robbery with violence contrary to **section 295** of the **Penal Code** as read with **section 296(2)**. In count one, the particulars of the offence were that on the 12 August, 2015 at Kikopey Trading Centre in Gilgil Sub County, and jointly with others not before the court and armed with metal bars and swords they robbed Leah Jepkoech Tanui cash of Shs 200 and a mobile phone make Techno, and at the time of the robbery used actual violence.

2. In count two, the charge alleged that they the accused robbed John Ngugi of shs 20,000/= and a mobile phone make Itel, valued at shs 8,500/=, and immediately after such robbery wounded the said John Ngugi.

3. The appellant was convicted on count 2 and sentenced to death, but was acquitted together with the other accused persons on count 1. The other accused persons were both also acquitted on count 2.

4. Dissatisfied with the outcome, the appellant has appealed against the judgment. His amended grounds of appeal are :

> ***"1. That the learned trial magistrate erred in law and fact by convicting the appellant meeting his conviction on the evidence of identification by recognition when there had been no advance report of such recognition made to the police.***

2. That the learned trial Mag erred in law and fact by convicting the appellant on insufficient, contradictory and uncorroborated evidence.

3. That the learned Mag erred in law and facts by rejecting the appellant's defence without cogent reasons; the same raised doubts and was able to overturn the whole prosecution evidence as adduced."

5. The appellant filed written submissions, which he relied upon at the hearing. The DPP who opposes the appeal, made oral submissions in respect thereof.

6. The issues for determination are as follows:

1. Whether there was sufficient evidence of identification;

2. Whether the conviction was justified on the uncorroborated evidence which ignored the appellant's defence.

7. The court's duty and role on a first appeal was well stated in the Court of Appeal case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 Of 2005** as follows:-

"…In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

> ***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'***

8. Further, in **Shantilal M Ruwala v R** (cited above) the Court of Appeal of East Africa analysed the case of **D.R Pandya v R 1957(EA) 336** and stated:

"The judgment of the learned magistrate dealing with the evidence showed that he had overlooked the real weaknesses of the Crown's case….

In Pandya's case the second proposition was that the first appellate court had failed to appreciate its duty in this respect and had in consequence given a merely formal approval of the learned magistrate's findings, instead of a considered evaluation of the facts in light of the defects shown to exist in the evidence"

9. In light of the above guidance I state my findings herein, taking into account the unrepresented appellant's issues.

Analysis of Facts and determination

10. The brief background of the case is as follows. PW1, John Ngugi Kuria, had completed his day's work and was going home within Kekopey, in Gilgil at around 11.00pm. He parked his motorcycle at a building about 800 metres from his house. As he walked he heard screams. Using his torch, he flashed it

ahead and met one John, the accused, approaching. He knew the accused because he was his customer. The accused was holding a metal bar. On the ground, he saw a lady. He greeted the accused who kept quiet.

11. The appellant then attacked PW1 and hit him on the neck. PW1 fell, and heard the appellant say that they should finish him as he had recognised them. Then the appellant struck PW1 on the head, cutting him and he fell unconscious. When he woke up he was in hospital in the ICU department. He had been carrying his mobile phone – make Itel – and Kshs 5,300/=, and both were now missing. He later reported to Kekopey Police post.

12. In cross examination, PW1 asserted that the appellant had hit him with a metal bar; that he had seen the appellant clearly when he flashed his torch on him; that the appellant was his customer and was known to PW1; that he was wearing a leather jacket and jeans.

13. PW1 was recalled to give evidence later in the hearing, and stated that on 18th October, 2016 he did describe the dressing of his attacker. He said:

> ***"He wore a black jacket and was carrying a crow bar. I used my torch to flash and see them. The jacket and crow bar is before court"***

14. In cross examination he said that he used his torch to see the appellant. Tat the appellant was known to him as the appellant used to repair his motor cycle as a mechanic; that he was the one who hit PW1 on the neck, and that it was he, the appellant, who told his accomplices to finish off PW1 as he had recognised the appellant.

15. PW2, Samuel Muigai Kagumo, testified that he was a shop owner at Kikopey where he resides. On the night of the incident, he received a call from Margaet Nyambura, PW1's mother who told him that PW1 had been attacked and that her husband had taken PW1 to hospital. He went to trace the scene and soon traced PW1's brother who said they had taken PW1 to hospital.

16. At about 4.00am, he met with the group that had taken PW1 to hospital and members of the public. Accused 1, the appellant, was named as the suspect and they went to his home. The lady victim who had been attacked and injured was also with them in a vehicle with her head bandaged.

17. At the appellant's house, they surrounded it and the appellant got out through the front door. He said he knew why they had come, and that it was because PW1 had been attacked. Appellant said he had been with an accomplice, and he led them to the brother's house where they found the accomplice asleep. The lady victim identified the appellant as one of her attackers but exonerated the accomplice. It was then that PW2 took away a sword the appellant was carrying, whilst members of the public wanted to lynch the arrested pair. PW1 prevailed against those calling to lynch the suspects and they were taken to Kikopey Police station.

18. PW3, Peter Kairu Kuria, is PW1s brother, and also resides in Kikopey. He testified that he received a call on 11th August, 2016 from another of his brothers who told him that the PW1 had been attacked. He therefore rushed to the scene where he found a crowd. He found PW1 lying on the ground seriously injured and bleeding. He also saw the lady, Leah, who had been attacked. She told them that PW1 had also been attacked and that she could identify the attacker as he was her customer.

19. PW3 testified that he and the people gathered at the scene arranged for a neighbour to drive the said Leah and PW1 to St Mary's Hospital. He accompanied them there. Leah was treated and discharged, but PW1 was admitted. Leah having been discharged, she and PW3 were carried back in the same vehicle. As they entered a petrol station at Kikopey, Leah saw the appellant and identified him as one of the attackers. He was at the petrol station which was well lit. PW3 also recognised the man as he hails from PW3's village and is a bicycle repairer and kiosk operator. According to PW3 the man was wearing a black leather jacket, blue jeans trousers and leather shoes.

20. According to PW3, they did not stop but drove to the upper side of Kikopey where they met a group of people and the appellant joined them, pretended to ask how PW3s brother was, and then left. Later, they went to the appellant's house and knocked on his gate. He came out holding a maasai sword, and told the group that he knew what had happened. It was at that point that the lady, Leah, stated that the appellant ha assaulted her, and so the group frogmarched appellant to the police station PW3 identified the appellant in the dock, identified the leather jacket and the sword.

21. In cross examination PW3 asserted that he saw the appellant when he was pointed out by Leah, but that he was not carrying anything. PW3 also asserted that it was he and a group of people that took appellant to the police station where a report had already been made.

22. PW6, PC Vincent Kiptoo testified that he was on duty at the Kikopey Police Post on 12th August 2016 the night of the attack when a group of about ten people brought the appellant to the police post at 5..am and made a report of the attack. He asserted that the appellant was the one who led the group to the 2nd accused's house where he too was arrested. Identification was provided by complainant 1, Leah, who says she saw the appellant using her torch.

23. In cross examination, PW6 stated that the appellant was identified by his faded black leather jacket by 1st complainant, Leah. PW1, was then still in hospital. He stated that they had been unable to trace Leah thereafter togive evidence.

24. In his defence, the appellant stated that on 11th August he was at his place of work all day until 11.00pm. At that time he met a customer whom he ferried to his destination. He then went home, had supper and retired for the night. At 3.00am he heard a knock on his gate and he picked a knife and went outside. He found people armed with crude weapons, they beat him mercilessly and frogmarched him to 2nd accused's house. There they called a lady was asked to identify him and second accused. The lady said that she had been robbed and assaulted and she had seen jacket like the one he was wearing. They were then taken to the police station, and later charged with offences herein. He said he was innocent He fell down.

Whether the accused was properly identified

25. The trial magistrate found as follows before convicting the appellant:

> ***"As regards Count 2 PW1 herein stated that he saw and recognised Accused 1 herein (the appellant). He even called out his name. He had sufficient time to see him. He used the light from his mobile phone to see and talk to him. To me the conditions prevailing at the time were conducive to afford him positive identification"***

26. I have already stated the evidence of PW1. In his evidence he said:

> ***"I had my torch on and I flashed it… I met with one John who approached holding a metal bar. He was my customer and I knew him…I greeted John but he kept quiet.„and shortly asked me whether I had gone to rescue her. He hit me on my neck"***

27. When PW1 was recalled to give evidence he stated that he used his flashlight to see the appellant. He also described the clothes worn by the appellant as a jacket and jean.

28. The appellant submits that there was still room for mistaken identification and that recognition was not positively proved. Citing the case **of Anjononi v R (1980) KLR59** he points out that the standard the Court of Appeal set is that:

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

29. On this issue, the prosecution relied on **Peter Ngure Mwangi v R [2014 eKLR** where the Court of Appeal discussed a number of authorities on the issue of identification, including the considerations to be taken into account, namely :

> ***"[whether] the conditions for mistaken identity did [or did not] exist"*** : **Okeno v R [1972 EA 32**
>
> ***"the distance between the witness and the suspect when he had him under observation, the length of time the witness saw the suspect, and the lapse of time between the date of the offence and the time the witness identified the suspect to the police":*** **R v Turnbull & Others [1976]3 All ER 549**

30. In the present case, PW1 saw the appellant; he was using his torch light when he first heard screams. When the appellant approached he recognised the appellant as a customer, a person he had dealt with before. He said that the appellant hit him with a metal bar on the neck which means he was close enough to him to do so. But further, PW1 testified that he spoke to the appellant; that the appellant didn't answer at first, but soon after asked whether PW1 had come to assist the lady. Clearly, hearing the voice of his customer no doubt entrenched his certainty of recognition, and this was fortified when he heard the appellant indicate to his accomplices that they should finish him off since he had recognised the appellant.

31. In my view, all this fulfils the necessary conditions for certainty of identity through recognition.

32. I appreciate, and it is true that the person who identified the appellant at the time of arrest was the lady, Leah, who had been attacked and injured, and later led a group of members of the public to where the appellant's house was. It is also true that she was later not traced in order to attend court and give evidence. However the evidence of identification is sealed by PW1's knowledge of the appellant and the fact that he was an eyewitness.

33. PW 3 gave corroborating evidence concerning how the appellant was identified by the first complainant, Leah, both at the petrol station and at the appellant's house. PW3 also testified that he knew the appellant as a bicycle repairman and kiosk owner, and that he was from his village. In my view the connection of identification and recognition is completed from the evidence of PW3 when considered in totality with the evidence of PW1 who also asserted that he knew the appellant, how he was dressed and that it was he who assaulted him. TW three and PW1 also identified the appellant in the dock as the person committed the assault.

34. In light of the foregoing, I am satisfied that the appellant was properly identified and accordingly convicted on a sound basis of recognition. PW1 identified the P3 form which was later produced as Exhibit 4. It shows that the report of the incident was made on 12th August, 2016, the very night of the attack.

Whether the conviction on uncorroborated evidence ignoring the defence was proper

35. As already stated, the evidence of identification was corroborated, and in my view the connecting dots were made by PW1 and PW3, people who knew the appellant.

36. The appellant argued that it was not crystal clear as to what led to his arrest, where he was arrested, and what the connection was between his arrest and the commission of the crime. He asserts that the connection between the attacks and his arrest was the lady Leah, but as she was not called to give evidence, there was an evidential gap which the prosecution was unable to fill.

37. Whilst the appellant is correct that the 1st complainant was not called to give evidence, he forgets that PW1 was also an eye witness. PW1 saw the appellant on the fateful night; in fact, he knew the appellant. He called him by name. He spoke to him. He saw him under torchlight. He had the opportunity, after hearing the screams of the 1st complainant, to attune himself to what was going on. He already had his torchlight on by the time he heard the screams. He used his torchlight to scan the scene. He saw the appellant approach him. He recognised him, and saw what he was wearing. In court he identified the

appellant.

38. With regard to the question whether the trial court ignored the defence of the appellant, the trial magistrate said:

> ***"They (all accused persons) all opted to tender unsworn evidence. They gave identical testimonies. They denied any wrong doing Accused 1 stated that he heard shouts outside his house and when he woke-up and opened he saw people carrying crude weapons and they attacked and beat him. They alleged he had robbed the complainant".***

30. Other than setting out the unsworn evidence of the appellant, it is true that the trial magistrate did not analyse that evidence. I have perused the evidence of the accused persons. It is not at all similar to that of the other accused persons. The appellant said that he was out on the night of the attack. He said that he met a customer who he ferried at about 11.00pm then he went home to retire. He did not admit to being at the petrol station or inquiring after PW1 as alleged by PW3. However, the rest of his evidence dovetails with that of PW3 concerning his being woken at night and coming out with a sword.

40. The appellant had no witnesses to offer, least of all the person he said he had ferried at 11.00pm. His evidence that a lady who alleged he had assaulted her identified him, corroborates the evidence of PW1, PW2 and PW3. He also corroborated the evidence of the circumstances of his arrest.

41. I am not convinced that the evidence provided by the appellant raises any issue that would cast doubt in my mind weighed as against the overall evidence against him. To that extent, although I agree that the trial Magistrate appears not to have given it any consideration and having done so myself, I do not find the omission of the trial magistrate o be consequential.

Disposition

42. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

43. Accordingly, the appeal is dismissed.

44. Orders accordingly.

Dated and Delivered at Naivasha this 20th Day of December, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

John Nderitu Mburu - Appellant in person

2. Mr. Koima for the State

3. Court Clerk - Quinter Ogutu