REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.85 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. Onyango - SRM delivered on 28th March 2011 in Kibera CM. CR. Case No.4032 of 2009)

DAVID NDIKU MAKAU……...…....……APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, David Ndiku Makau 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 the night of 31st August 2009 along Langata Road near KWS Headquarters in Nairobi County, the Appellant, jointly with others not before court, while armed with a pistol robbed James Rabet Oliech of a motor vehicle registration No.KAV 879M make Nissan B14, Kshs.3,500/- , a mobile phone Nokia 1100 all valued at Kshs.456,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said James Rabet Oliech (hereinafter referred to as 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. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court challenging the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction. He was aggrieved that he had been convicted essentially on the evidence of identification which was made in circumstances that were not favourable to positive identification. He took issue with the fact that he had been convicted on the basis of evidence that was insufficient in that crucial witnesses were not called to give their testimony in the case. The Appellant complained that the trial court wrongly admitted into evidence the evidence of identification parade that was conducted by the police. He was of the view that such evidence as was adduced by PW3, the parade officer, was inadmissible. The Appellant was aggrieved that the trial court had misdirected itself by shifting the burden of proof and thereby excusing the prosecution from the burden of discharging the onus of proof. Finally, the Appellant was aggrieved that the trial court had failed to consider the totality of the evidence adduced and in particular his defence before reaching the determination finding him guilty as charged. 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, the Appellant presented to court written submission in support of his appeal. In the submission, the Appellant urged the court to re-evaluate the evidence of identification that was adduced by the prosecution and reach a determination that it was not sufficient to establish his guilt to the required standard of the law. In particular, the Appellant submitted that the trial court failed to take into consideration the fact that the evidence of identification that was relied on by the trial court was that of a single identifying witness made in difficult circumstances. He was of the view that the trial court did not take into account the fact that the robbery incident took place at night and the fact that there was no sufficient light that could have enabled the identifying witness to be certain that he had positively identified the Appellant as a member of the gang that robbed him. The Appellant urged the court to take into consideration the totality of the evidence adduced and particularly the fact that his alleged description by the identifying witness was not made in the first report that was recorded by the police. He further submitted that the persons who allegedly found him in possession of the stolen motor vehicle were not called by the prosecution to testify in court. It was his case that in the absence of such evidence, there was no nexus or connection between himself and the recovered stolen motor vehicle. He was irked that the trial court had failed to consider the evidence that he had adduced in his defence which, in his view, exonerated him from the crime and thereby reached the erroneous determination that he was guilty of the offence that he was charged with.

In response to his submission Ms. Sigei for the State submitted that the prosecution had established its case against the Appellant to the required standard of proof. She stated that the identifying witness had given the physical attributes of the Appellant in the first report that he made to the police. The robbers, including the Appellant, were in close proximity with the identifying witness for such a long period of time that the identifying witness was able to positively identify the Appellant. In particular, she submitted that the robbers switched on the interior lights of the motor vehicle as they were robbing the complainant and therefore this enabled the complainant to identify the Appellant. During this period of interaction, the complainant saw that the Appellant had a large mouth with a scar on his lip. These attributes came into play when the complainant was called four days later to attend an identification parade held at Sultan Hamud Police Station (where the stolen motor vehicle had been recovered, and where the Appellant had been arrested).

In the said identification parade, the complainant was able to positively identify the Appellant. She urged the court to apply circumstantial evidence and the doctrine of recent possession in its assessment of the evidence adduced against the Appellant. This was because the Appellant was found in possession of the stolen motor vehicle a few hours after the same had been robbed from the complainant. She submitted that the trial court had properly evaluated the evidence, including the defence adduced by the Appellant, and thereby reached the correct determination that indeed the prosecution had proved its case to the required standard of proof. She urged the court not to interfere with the findings of the trial court.

Before giving reasons for its decision, it is imperative that the facts of this case be set out. PW2 Evans Mugo Ndwiga was at the material time the owner of motor vehicle registration No. KAV 879M Nissan B14 grey in colour. PW2 is a Prison's officer and was at the time based at Langat Women's Prison. On 31st August 2009 at 10.00 a.m. he requested the complainant who testified as PW1 to take his visitors to Akamba bus stage. PW2 gave the complainant his motor vehicle to execute the task. The complainant is a mechanic by trade. PW2 requested the complainant to service the motor vehicle before returning the same to him. From the evidence, it was apparent that PW2 trusted the complainant. On the particular day, PW2 did not mind even if the complainant were to stay overnight with the vehicle. The complainant testified that he completed the task that he was assigned by PW2.

At 7.00 p.m. on the material day, as he was driving along Langata Road on the way to his residence at Ongata Rongai, a motor vehicle overtook him and stopped ahead of him. A person emerged from the motor vehicle and accused him of having occasioned an accident and then escaped from the scene of the accident. From the clothes that the person wore, the complainant thought that he was a police officer. After a while, two other men emerged from the vehicle. One was wielding a pistol. He identified himself as a police officer. It was then that they bundled him into the rear seat of the motor vehicle before one of them took control of the motor vehicle and drove off. They ransacked his pockets and robbed him of his mobile phone and Kshs.3,500/-. During this time, the interior lights of the motor vehicle had been

switched on. The complainant testified that it was at this point that he was able to identify the facial appearance of the Appellant. He described the Appellant as being dark in complexion, shorter than him and with a large mouth and a mark on his lip. The complainant's face was then covered. He was driven for a couple of hours before he was abandoned. His legs and hands were bound. After the robbers had left, the complainant managed to free himself. He discovered that he had been abandoned in a bushy area next to the Nairobi-Mombasa Highway. On making inquiry, he was told that he had been abandoned in an area near Machakos. He was directed to a roadblock which was being manned by police officers. The said police officers assisted him by flagging down a motor vehicle to give him a lift to Machakos Police Station. He made the report of the robbery. He was directed to make the report to Langata Police Station within whose jurisdiction the robbery had taken place.

As it was late, the complainant decided to first report the incident to the owner of the motor vehicle (PW2). PW2 accompanied him to Langata Police Station where the incident was reported on 1st September 2009. At the said police station, they were informed by PW5 PC Douglas Nzulua, the police officer who had been assigned to investigate the case that the motor vehicle had been recovered and was at the time being detained at Salama Police Station. PW5 wrote a letter to the officer in-charge of the said police station and gave it to the complainant and PW2. PW2 was required to carry with him a copy of the Logbook to establish the ownership of the motor vehicle. The complainant and PW2 travelled on the same day to Salama Police Station where they were able to positively identify the recovered motor vehicle as being the one that was robbed from the complainant on the night of 31st August 2009. They were informed that the case was being investigated by the police based at Sultan Hamud Police Station. They were further informed that a suspect had been arrested while in possession of the motor vehicle. On 4th September 2009, the complainant was requested to attend an identification parade with a view to identifying if any of the persons who robbed him were in the identification parade. The identification parade was conducted by PW3 CIP Michael Ogonga. He told the court that he conducted the said identification parade in accordance with the established rules. In the identification parade, the complainant picked the Appellant from the identification parade. The complainant testified he was positive that the Appellant was a member of the gang that robbed him of the motor vehicle.

PW4 PC Nathan Nyaga, then based at Salama Police Station testified that on 1st September 2009 the Appellant was brought to the police station by the area chief accompanied by members of the public. The Appellant was suspected to have stolen the motor vehicle. This was because the Appellant was found in possession of the motor vehicle. PW4 received and detained the Appellant. The Appellant was later taken to Sultan Hamud Police Station where he was pointed out by the complainant in the identification parade. PW5 testified that upon concluding his investigations, he formed the opinion that a case had been made for the Appellant to be charged with the offence for which he was convicted. The motor vehicle, the subject of the charge was produced as an exhibit during trial. Similarly too, were the parade forms.

In his defence, the Appellant denied that he participated in the robbery or that he had positively been identified during the course of the robbery. He explained the circumstances of his arrest. He told the court that on the morning of 1st September 2009, he was apprehended by a group of people who accused him of being a member of the gang that robbed people of their motor vehicles. He was assaulted before being rescued by police officers. He was taken to Sultan Hamud Police Station where, after being detained for four days, he was placed in an identification parade where he was allegedly positively identified by the complainant. He reiterated that he did not participate in the robbery in question. He pleaded his innocence.

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.

It was clear from the evidence that was adduced by the prosecution during trial and the grounds of appeal put forward by the Appellant, that the issue for determination by this court is whether the evidence of identification that was adduced during trial was sufficient to establish the guilt of the Appellant to the required standard of proof. It was evident that the prosecution relied on the identifying evidence of a sole witness which was made in circumstances which may be described as being difficult.

In re-evaluating this evidence, this court is cognizant of the fact that it should bear in mind the warning given by the Court of Appeal when considering such evidence. In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200** it was held thus:

"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with 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 possibility of error".

In the present appeal, the complainant testified that he was able to positively identify the Appellant when the interior light in the motor vehicle was switched on. This was during the time that he was being robbed. He pointed out the facial features of the Appellant in the first report that he made to the police. This included the fact that his assailant was a person of dark complexion with a big mouth with a scar on his lip. The complainant testified that he was in company of the robbers, including the Appellant, for a couple of hours during which time he interacted with the Appellant at close proximity. The complainant was able, without hesitation, to point out the Appellant in the identification parade that was held four days after the robbery. It is instructive that the trial court noted the description that the complainant made in the first report to the police fitted with the actual attributes of the Appellant: he is dark in complexion, had what can be described as a large mouth, and had a scar on his lip.

If there was any doubt that the complainant had positively identified the Appellant, this doubt was removed when the complainant pointed out the Appellant in the identification parade which was mounted by the police. The Appellant has challenged the manner in which the said identification parade was conducted. However, upon re-evaluation of the evidence, this court is unable to agree with the thrust of the Appellant's appeal that the said identification parade was not conducted in accordance with the rules. This court has warned itself of the danger of relying on the evidence of a sole witness to convict the Appellant. Having so warned itself, this court holds that the prosecution did indeed establish to the required standard that the Appellant was indeed positively identified by the complainant in the course of the robbery. There is no doubt in this court's mind that the prosecution established that the Appellant was a member of the gang that hijacked and then robbed the complainant.

Any lingering doubt that the Appellant was indeed a member of the gang that robbed the complainant was removed by the evidence adduced by the prosecution which connected the Appellant to the stolen motor vehicle a few hours after it had been robbed from the complainant. The Appellant did not give believable

explanation of how he was found in possession of the said motor vehicle a few hours after it had been robbed at gun-point from the complainant's possession. The doctrine of recent possession, without doubt, applies in this case. In **Malingi –Vs- Republic [1989] KLR 225** at Page 227 Bosire J (as he then was) held thus:

> "***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In the present appeal it is clear that apart from the evidence of identification, the prosecution adduced evidence which connected the Appellant to the stolen motor vehicle a few hours after the same had been robbed from the complainant. Taking into consideration the totality of the facts of this case, this court holds that the grounds put forward by the Appellant challenging his conviction by the trial court lacks merit. His defence was properly considered by the trial court as not capable of raising any issues that would dent the otherwise strong, cogent, corroborated and consistent evidence that was adduced by the prosecution witnesses.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. His conviction and sentence is upheld. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY 2017

L. KIMARU

JUDGE