REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 82 OF 2013

JACKSON KIBIWOT CHELIMO.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable E. Tanui in Eldoret Criminal Case No. 3191 of 2012, dated 23rd April, 2013)

JUDGMENT

1. The appellant, *Jackson Kibiwott Chelimo* was charged with the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code*. The particulars thereof allege that on 21st May 2012 at Boiywech village in Keiyo South District within the Rift Valley Province, while armed with a panga, the appellant robbed *Patrick Kiprugat Kiplagat* of a motor bike registration number KAC 875H make King bird 150/3 valued at Ksh 83,000 and immediately before the time of the robbery wounded the said *Patrick Kiprugut Kiplagat.*

2. The appellant denied the charge. After a full trial, he was convicted of the offence of attempted robbery with violence contrary to *Section 297 (2)* of the *Penal Code* and sentenced to death.

3. The appellant was aggrieved by his conviction and sentence. He appealed in person to this court vide a petition of appeal filed on 26th April 2013. He subsequently engaged the services of *Ms Miyienda & Company Advocates* who filed a supplementary record of appeal dated 22nd October 2015. In the supplementary record of appeal, the appellant raised four grounds of appeal which are as follows: -

> ***(i) The Honourable learned trial Magistrate erred in law and fact by failing to find and hold that there was no robbery that ever took place as alleged on 21st May 2012 to constitute the offence of robbery with violence Contrary to Section 296(2) of the Penal Code.***
>
> ***(ii) The Honourable learned trial Magistrate erred in law and fact by convicting the appellant without any evidence of identification.***
>
> ***(iii) The Honourable learned trial Magistrate erred in law and fact by convicting the appellant on contradictory evidence on material facts to the case in respect to the recovered items, the motorbike weapons, date of treatment among other contradictions.***
>
> ***(iv) The Honourable learned trial Magistrate erred in law and fact by failing to consider defence evidence of DWI and DW2 point strongly at PW1's love affair with DW2.***

4. At the hearing of the appeal, learned counsel *Mr. Miyienda* reiterated the grounds of appeal in his submissions and invited the court to find that the appellant was wrongly convicted as the evidence on record did not prove that the offence of robbery with violence was committed; that the appellant was not positively identified during the alleged robbery as the incident occurred at 7. 40p.m and that it was dark. That the complainant's assailant was wearing a muffin which hid his face. It was his further submission that the charge was a fabrication owing to a serious dispute between the complainant and the appellant brought about by the fact that the appellant was having an adulterous affair with his wife. He urged the court to allow the appeal.

5. On her part, learned prosecuting counsel *Ms Oduor* opposed the appeal. She submitted that the appellant was convicted of the offence of attempted robbery with violence and not robbery with violence; that he was sufficiently identified by the complainant since it was a case of recognition not that of identification of a stranger; that the appellant was not arrested immediately as he had disappeared from his place of work which was an indicator of guilty knowledge. She invited the court to dismiss the appeal for lack of merit.

6. This is a first appeal to the High Court. I am fully aware of the duty of the first appellate court which is to re-evaluate and re-examine all the evidence tendered before the trial court to reach my own independent determination. In undertaking this task, I should remember that unlike the trial court, I did not have the benefit of hearing or seeing the witnesses and give due allowance for that disadvantage.

See: ***Okeno V Republic (1972) EA 32***, ***Kinyanjui V Republic (2004)2 KLR 364***

7. I have carefully considered the evidence presented to the trial court in its entirety; the grounds of appeal, the rival submissions made on behalf of the appellant and the state as well as the judgment of the learned trial magistrate.

8. I wish to start with the appellant's complaint that the learned trial magistrate erred by disregarding his defence. I have perused the learned trial magistrate's judgment. It leaves no doubt that the trial court considered the evidence adduced by the appellant and his witness but rejected it finding that it did not cast any doubt in the prosecution's case.

9. As started earlier, I have confirmed from the learned trial magistrate's judgment that the appellant was convicted of the offence of attempted robbery with violence contrary to *Section 297(2)* of the *Penal Code* and not robbery with violence Contrary *Section 296 (2)* of the *Penal Code.*

In the premises, the 1st ground of appeal and the learned counsel's submission that the evidence did not disclose the offence of robbery with violence is with respect misconceived.

10. It is clear from the evidence on record that the prosecution case was mainly based on identification evidence from PWI. PWI testified that he ran a motor cycle business and on 21 May 2012 at around 7.30pm, he was riding home in his motor cycle registration No. KMCU 875H when he found the road to his home barricaded with stones. As he was preparing to dismount from the motorcycle to remove the stones, a person he identified to be the appellant herein emerged from his right side and said in Swahili "Leta hiyo pikipiki" meaning in English ''bring that motor cycle''. He held a panga on the right side and a walking stick on the left hand. He was wearing a muffin cap. He then cut him on the right eye and upper arm. When he grabbed him, he bite him on the right jaw.

He screamed and this is when PW2 and PW3 went to his rescue. The appellant then ran away.

11. According to PW2 and PW3, when they arrived at the scene, PWI reported that it was one *Jackson Chelimo* referring to the appellant who had attacked him. He was taken to hospital by PW2 where he was treated by PW4. PW2 and PW3 did not identify the assailant.

12. The learned trial magistrate relied on the alleged identification of PWI to convict the appellant. This was therefore a case in which the basis of the appellant's conviction was the identification evidence of a

single witness.

There is a plethora of authorities articulating the circumstances in which the evidence of a single identifying witness can form the basis of a safe conviction. It will be sufficient to cite just two of those authorities.

In ***Wamunga V Republic (1989) KLR 424,*** the Court of Appeal held that; ***"It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction".***

In ***Kiarie V Republic (1984) KLR 739,*** the same court held that; "***it is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction".***

13. In this case, it is clear from the evidence that the incident took place at 7.30pm, a time of the evening which is normally expected to be dark. PWI in his evidence did not explain how he was able to see and identify the appellant as his assailant at that time. He did not say that there was any source of light at the scene that enabled him to see and identify or recognize his assailant as the appellant. And though he allegedly told PW2 and PW3 when they arrived at the scene that it was the appellant who had attacked him, he did not disclose the identity of his assailant to the police when he reported the incident the same evening about an hour after it's occurrence.

In his evidence under cross-examination, PWI admitted that in his statement to the police, he recorded that a "person" emerged from the right side and attacked him.

14. If indeed it is true that he had identified the appellant as his assailant, I find it difficult to understand why he did not disclose his name to the police.

In ***Simiyu V Republic (2005) KLR,*** the importance of disclosing the name or names of suspects identified during the commission of a crime was emphasized. The Court of Appeal held thus;

> ***"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given. The omission on part of complainant's to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity".***

I cannot agree more.

15. The learned trial magistrate in her evidence did not interrogate PWI's evidence to establish whether or not his alleged identification of the appellant was positive, reliable and credible. She did not address her mind to whether the circumstances prevailing at the time of the alleged attempted robbery were conducive to a positive and reliable identification or recognition of the assailant. Her finding that PWI identified the appellant through light from his motor cycle was not based on any evidence since PW1 in his evidence did not claim that he had identified the appellant through lights from his motor cycle. Failure of the learned trial magistrate to establish the circumstances under which the appellant was allegedly identified in this case was an error of law.

16. I am guided in the above finding by the Court of Appeal's decision in in ***Maitanyi V Republic (1986) KLR 198*** where the court held as follows;

> "***when testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and***

description of the accused. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction".

17. On my own re-appraisal of the evidence, I find that the circumstances surrounding the commission of the offence were not conducive to a positive and reliable identification of the assailant. Given the evidence on record, the circumstances in which the appellant was allegedly identified and recognized cannot be said to have been free of the possibility of error.

18. In view of the foregoing, I find that the appellant's conviction was not safe. It cannot thus be allowed to stand. I therefore find merit in this appeal and it is hereby allowed. The appellant's conviction is accordingly quashed and the sentence set aside.

The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of February 2017

In the presence of:

The appellant

Mr. Miyienda for the appellant

Ms. Kigegi for the state

Mr. Lobolia Court Clerk