REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO 64 OF 2015

MATHIAS MUNYAO MUTUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. D.G. Karani PM

in Criminal Case No. 1084 of 2014, delivered on 28th April 2015 at the

Principal Magistrate's Court at Kithimani)

JUDGMENT

On 8th September 2014 at about 10 pm, John Wambua Nthenge, the complainant herein (PW1), walked home with the Appellant and another person from Kistimani Market. When they reached near the complainant's house, it is alleged that the Appellant and the other person held the complainant by the neck and robbed him of Kshs 7,000/=. The complainant then screamed and his children came to his rescue, which is when the Appellant and his accomplice ran away.

Thomas Kioko Wambua (PW3) was one of the complainant's children who came to the rescue, and he testified that on reaching the scene of the screams, he found the Appellant and one Muthini Wambua strangling PW1. He stated that there was moonlight, and that when the Appellant saw them, he ran away. He also testified that his father (PW1) told him that he had been robbed of Kshs 7,000/=.

The Appellant was later arrested and charged in the trial Court with the offence of robbery, contrary to section 295 as read with section 296(1) of the Penal Code. He pleaded not guilty.

PW1 and PW3 gave the foregoing account of events in their evidence during the trial that ensued. Evidence was also given by one Daniel Kyalo who was PW2, to the effect that he was with PW1 at Kistimani market on 8th September 2014 where they parted ways, and PW1 left with the Appellant and one Muthini. He did not witness the robbery. The last witness was Cpl Herman Kemboi (PW4) of Kwa Mwaura Police Patrol Base, who testified as to receiving the report of the robbery by PW1 on 9th September 2014, and of arresting the Appellant on 25th October 2014 after he was identified to him by the complainant.

The Appellant was put on his defence and gave unsworn testimony, and called one witness. He testified that the complainant's son had eloped with his wife and that is why they engineered his arrest to make

him stop following up on the matter. DW2 was Benedetta Wanzila Mutunga, the Appellant's sister who testified that on 8th September 2014 she heard some noises from the Appellant's house, and when she went to the house she found him there drunk.

The Appellant was convicted of the charge of robbery and sentenced to serve five (5) years imprisonment. He is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against his conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition of Appeal dated and filed in Court on 13th May 2015.

These grounds of appeal are as follows:

1. The Learned Magistrate erred in law and fact in convicting the accused person on the evidence of a single identification witness without warning herself on the dangers of relying on such evidence.

2. The Learned Magistrate erred in law in failing to consider some relationship of the Appellant and the family of the complainant which tainted the complainant evidence with bias rendering it incredible.

3. The Learned Magistrate erred in law and fact in failing to appreciate that the prevailing conditions were not conducive to a favourable identification and therefore erred on basing his conviction on that evidence.

4. The Learned Magistrate erred in law failing to evaluate the entire evidence and in particular in failing to give the evidence of the accused/appellant attention it requires.

5. The sentence passed was excessive in the circumstances of the whole case.

The Appellants' learned counsel , Paul Kisongoa & Company Advocates, filed written submissions dated 25th July 2016 and 13th December 2016, wherein it was urged that the prosecution failed to prove the Appellant guilty beyond reasonable doubt as the ingredient of force was not proved as no medical evidence was produced to prove the strangling; no one saw the Appellant take away the money from the complainant; there was no legal identification and/or recognition of the Appellant; and that the trial Magistrate did not evaluate the evidence of the defence properly or at all and did not consider the defence of alibi inferred from the evidence of the accused .

Reliance was placed on the decisions in **Oluoch - vs - Republic (1985)KLR 549** on the issue of identification; in **Soki v. Republic (2004)2 EA(CAK) 266,** and **Huka and Others v. Republic (2004)2 EA(CAK) 77** on analysis of evidence; and **Woolmington v. Director of Public Prosecutions (1935) A.C. 462** on proof beyond reasonable doubt.

Ms. Rita Rono, the learned Prosecution counsel, filed submissions in response to the Appellant's appeal dated 5th December 2016, wherein it was argued that the prosecution called a total of four witnesses who proved the case beyond reasonable doubt. On the ground of identification, it was submitted that PW1 testified that he was walking home with the Appellant and another who was at large, and that the complainant knew the Appellant before as they were neighbors hence he was positively identified.

Further, that in case the Appellant was to rely on the defense of alibi he should have informed the Prosecution at the earliest time possible and not during defense. This would have given the Prosecution enough time to ensure that the alibi establishes reasonable doubt as to whether or not the accused was at the scene of crime as held in **Basil vs Okaroni,** Criminal Appeal 49 of the High Court of Busia.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). The two issues raised by the Appellants' grounds of appeal and submissions are firstly, whether there was

proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of robbery was based on consistent and sufficient evidence.

On the issue of identification, it was urged by the Appellant that reliance was placed on a single identifying witness. However, I note in this regard from the evidence of PW1 that the Appellant was known to him from before, which evidence was confirmed by the Appellant's evidence that they had a previous dispute with PW1 and his family. This was therefore a case of recognition, and the evidence that PW1 and the Appellant walked home together was corroborated by PW2. It is thus my finding that the Appellant was positively identified as one of the persons who walked with PW1 home on the night of 8th September 2014.

It has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

On the issue of whether there was consistent and sufficient evidence to convict the Appellant for the offence of robbery, section 295 of the Penal Code defines the offence of robbery as follows:

> **"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.."**

Robbery is punishable in section 296(1) by as a maximum term of fourteen years imprisonment.

The prosecution must prove theft and violence as **the central elements of the offence of robbery, as the offence is basically an aggravated form of theft as it involves stealing with violence.** In the present appeal, it is only PW1 who testified as to the theft of Kshs 7000/= by the Appellant. No other witness saw the said money or the Appellant appropriating it. No evidence was brought by PW1 as to the existence of the money or that it was actually in his possession as the time of the alleged robbery. Lastly, no money was recovered from the Appellant who was alleged to have disappeared after the alleged robbery.

As regards the proof of violence, PW1 testified that the Appellant held him by the neck, while PW3 testified that he saw the Appellant strangling the Appellant. No medical evidence was produced to show that force used on PW1 during this acts. It is thus my finding that in light of the gaps noted in the evidence by PW1 as to the theft of his money and in the evidence of the violence alleged to have meted out on PW1, the alleged robbery was not proved beyond reasonable doubt.

Arising from the foregoing reasons, I allow the Appellant's appeal and quash the conviction of the Appellant for the offences of robbery contrary to section 295 as read with section 296(1) of the Penal Code. I also set aside the sentence of five (5) years imprisonment imposed upon the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE