REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.211 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. E. Michieka – Ag. PM delivered on 9th October 2013 in Kikuyu SPM.Cr. Case No.15 of 2011)

ZACHARIA WAMUGI NDUNGU…….……APPELLANT

VERSUS

REPUBLIC…….…….....RESPONDENT

JUDGMENT

The Appellant, Zacharia Wamugi Ndungu was charged with two (2) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offences were that on 25th September 2011 at Gikambura area in Kiambu County, the Appellant, jointly with others not before court, robbed Jane Wambui Wairimu and Moses Ondoro Ombati of their mobile phones, DVD machine, Gas Cylinder and cash all valued at Kshs.21,050/- and at or before or after the time of such robbery, used actual violence against the said Jane Wambui Wairimu and Moses Ondoro Ombati. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of both counts. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his 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 sole evidence of identification which was made in circumstances that were not conducive for positive identification. He took issue with the fact that he had been convicted on the basis of contradictory, inconsistent and incredible evidence of prosecution witnesses. He faulted the trial magistrate for convicting him on the basis of a duplex charge sheet that was defective. He was aggrieved that the trial magistrate failed to consider his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had established that it was the Appellant who robbed the complainants. The evidence adduced by the prosecution witnesses was watertight and placed the Appellant at the scene of the robbery. She urged the court to dismiss the appeal.

The facts of the case are as follows. PW3 Moses Ondoro Ombati and PW2 Jane Wambui Wairimu, were neighbours residents of Gikambura area in Kiambu County. On the 25th day of September 2011 at about

11.30 p.m., while PW3 was walking to his house, he was accosted by three men who were armed with sticks. The men robbed him of his phone, make Samsung SGH 250 and Kshs.200/=. They then ordered him to lead them to his house. When they got there, PW3 opened the door and switched on the electric light. Two of the robbers entered his house. They took his gas cylinder. They then ordered him to escort them to PW2's house.

On the same night at about midnight, PW2 received a phone call from David Kungu, her brother, asking her to tell her other brother, PW4 Evans Kimani Wairimu, who happened to be her neighbour, to take him to hospital. She stepped outside to deliver the news. This was when she was confronted by three robbers who at the time were holding PW3 hostage. One of the robbers asked her to give him her phone. It was a Nokia 7300. She complied. They then led both PW2 and PW3 into PW2'S house. They ordered PW3 to get under PW2's bed. One of the three robbers then asked PW2 to give them money. She replied that she had none. She asked them to take her household goods instead. They took two Sony DVD machines. They then asked her to lie down. They threatened to rape her. She pleaded with them not to harm her. They led her out of the house. While outside, one of the attackers asked her for Kshs.20,000/=. She told him that she could only give Kshs.1000/= which was in her possession. The robbers were not satisfied that she was being candid with them. She was hit with a wooden stick and injured on her left eye. That was when she raised alarm, prompting the attackers to flee. Neighbours responded to her screams and took her to the hospital. She was admitted. She reported the matter to Kikuyu Police station on 10th October 2011 upon being discharged from the hospital. At the station, PW5, Corporal Ahmed Rashid, attended to her. PW2 was recuperating from her injuries at the time. PW5 was unable to take her statement. She went back home to rest. She later recorded her statement with the police. On the 24th day of December 2011, about three months later, PW3 testified that he saw one of the robbers at the bus stop in Gikambura. He informed PW2. He also notified the police. The police went to the bus stop, arrested the Appellant and escorted him to the station.

When the Appellant was put on his defence, he denied committing the offence. He told the court that on the day he was arrested, he had gone to his usual place of business where he was a mechanic and a driver. He stated that he was shocked when he was arrested by the police on allegations that he had robbed the complainants. In particular, he questioned why it had taken the complainants so long to report the matter to the police and yet they lived in the same neighbourhood. He told the court that he had not been found with any weapons or stolen items. There was nothing connecting him with the offence. 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 arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanuor of the said witnesses (see **Okeno -vs- Republic [1972] EA 32)**. In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant for the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. From the evidence adduced by the prosecution witnesses, it was clear that the prosecution relied solely on the evidence of identification to secure the conviction of the Appellant. PW2 Jane Wambui Wairimu testified that she was attacked by a gang of three robbers at about midnight on the night of 25th September 2011. She was beaten and injured on her head. In fact, she lost eyesight in one of her eyes. She told the court that one of the robbers wore a marvin. After the robbery incident, she was rushed to hospital where she was admitted. She did not record a statement with the police until three weeks after the incident i.e. on 10th October 2011. It was clear from her testimony that she did not give the description of her assailants in the first report and in the statement that she made to the police. Similarly too, PW3 Moses Ondoro Ombati, the other complainant narrated how he was accosted by three men, escorted to his house, where he was robbed of his Gas Cylinder. They also robbed him of cash and his mobile phone. He told the court that prior to the robbery incident, he had not met with any of the robbers. He confirmed that he had not met with the Appellant prior to the robbery incident. It

was his evidence that the Appellant was one of the robbers who robbed him. He did not give the description of the persons who robbed him in the first report that he made to the police. He told the police that he would be able to identify the robbers if he saw them again. It was in that regard that on 24th December 2011, three months after the incident, that the PW3 saw the Appellant at the bus stage at Gikambura. He informed the police that the Appellant was one of the persons who had robbed him three months prior to the incident. The Appellant was arrested and was taken to the police. He was subsequently charged with the two offences. The Appellant denied the allegation that he had robbed the complainants.

The law regarding how a court should treat the evidence of identification especially that which was made in difficult circumstances is well settled. in **Maitanyi –Vs- Republic [1986] KLR 198** at P.200:

> ***"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:-***
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> > ***"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, there is no doubt that the complainants testified that they identified the Appellant during the time of the robbery. The robbery took place at night. The complainant testified that they were able to identify the Appellant because the electric light had been switched on. The complainants did not however tell the court the length of time that they saw the Appellant to enable them be certain that they had identified the Appellant as one of the robbers who robbed them. They did not give the physical features that distinguished the Appellant from the rest of the robbers. As was held in the case of **Mwaura –vs- Republic [1987] KLR 645**:

> ***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."***

Further, it was clear from the evidence adduced by the complainants that they did not give the physical description of the robbers in the first report that they made to the police. PW2 testified that because of the injuries that she had sustained during the robbery incident, she was not able to identify the robbers. However, when she testified before court, she recalled that the Appellant was one of the robbers. That is dock identification which is worthless as evidence. PW3 told the court that he told the police that he would be able to identify the robbers if he ever saw them again. Indeed, this is what PW3 did three months after the incident. However, this court was not satisfied that PW3 properly identified the Appellant as one of the persons who robbed him. In the absence of a description given in the first report that was made to the police, this court is unable to reach a finding that the identification made by PW3 was watertight and free from the possibility of error. The Court in **David Gathu Kang'ethe –vs- Republic [2015] eKLR** held that in the absence of the description of the assailant being made in the first report to the police, the evidence of identification cannot be said to be devoid of the possibility of error or be free from the possibility of mistaken identity. There was no other evidence which was adduced by the prosecution to connect the Appellant with the robbery. Nothing that was stolen from the complainants was recovered in the Appellant's possession.

The upshot of the above reasons is that this court is not satisfied that the evidence of identification adduced by the prosecution witnesses sufficiently connected the Appellant to the robbery. The complaint

by the Appellant that he was a victim of mistaken identity may well be true. The evidence of identification that was adduced by the prosecution witnesses is not watertight as to exclude the possibility of error. The Appellant's appeal therefore has merit and is hereby allowed. The Appellant's conviction on the two counts of robbery with violence is hereby quashed. The death sentence imposed on the Appellant is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JUNE 2017

L. KIMARU

JUDGE