REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 110 OF 2015

PAULO KITEMA…….....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Principal Magistrate's Court Criminal Case No. 289 of 2015** by **Hon. Z. J. Nyankundi P M** on **03/12/15**)*

J U D G M E N T

1. **Paulo Kitema,** the Appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.** Particulars of the offence were that on the **21st June, 2015** at **9.30 p.m.** at **Ndiliani Village, Ikanga Location** in **Mutomo Sub-County** within **Kitui County** jointly with another not before Court while armed with dangerous weapons namely panga robbed **Samuel Kuvuna Kshs. 500/=** and at the time of such robbery used actual violence to the said **Samuel Kuvuna.**

2. He was tried, convicted and sentenced to death.

3. Aggrieved by the conviction and sentence he Appealed on grounds that:

- The learned trial Magistrate casually dismissed the alibi defence without considering its weight.
- There was no proper identification of the Appellant as one of the robbers.
- The learned Magistrate applied selective bits of evidence in convicting the Appellant while disregarding the exonerating evidence.

4. Facts of the case were that on the **21st June, 2015** at **9.00 p.m.** PW1 **Samuel Kuvuna Mutava,** his wife, PW2, **Grace Samuel Kuvuna** were inside their house when they heard a person calling out. He identified himself as their employee, **Mukovi** and sought assistance to take his sick mother to hospital. PW2 switched on solar lights and opened the door. Two persons one of them that she identified as the Appellant forcibly entered the house. The Appellant in particular pushed PW2 against the wall, the bangle he wore fell off his hand. In the process PW2 sustained an injury on her hands. One of them demanded money from her and threatened her using a panga by putting it on her neck. They screamed attracting the attention of their daughter-in-law, PW3, **Jame Mutave Kambu.** She went to their house and saw people running away. Prior to running away one of them hit PW2 on the head and the left hip. They took away **Kshs. 500/=** that was in the wallet on the table. The matter was reported to the police. The Appellant was arrested and charged.

5. In his defence the Appellant denied residing at **Ikanga.** He testified that he stays at **Kyanonga village**

and is an employee of **Kenya Power.** That he stays with his in law **John Mwanza** while away from his place of work. Further, he stated that he went to see them in **December, 2014** and went back to **Kyanunga.** He stayed there until **June, 2015** when he was arrested. He called **John Mwanza Kikole** (DW3) as a witness who referred to him as his nephew. He stated that on **21st June, 2015** the Appellant was at his home. They parted way at **11.00 p.m.** DW4, **Margaret Nguatya John** the wife of DW3 referred to him as their worker and added that at **9.30 p.m.** he assisted them to push DW3's motor-vehicle. Their evidence was also confirmed by DW5 **Joyce Titus** and DW6 **Sheck Alfred Mwanza.**

6. The Appeal was disposed off by way of written submissions. **Mr. Mwalimu,** Counsel for the Appellant submitted that evidence adduced by three (3) witnesses confirming the Appellant's defence of alibi was watertight. Dismissing the defence on reasons given that there was no proof of ownership of the motor-vehicle was erroneous. That there was no proper identification of the assailants. The name of the Appellant was disclosed by PW6, **Mwangangi Ngilita** an employee of the Complainant after being told by another on the **28th June, 2015** and that if indeed the Appellant was identified he could not have continued working for one week without his name being given or arrest being effected.

7. In response, the State opposed the Appeal. It was submitted by that the alibi defence was not watertight. The Appellant was properly identified as lights were on. That there was evidence that the Appellant was armed with dangerous weapons, that he wounded PW1 and PW2 and stole from them **Kshs. 500/=.**

8. This being an Appellate Court, I am under a duty to subject the evidence adduced at trial to a fresh scrutiny and make my own conclusion bearing in mind the important fact that I never observed the witnesses who testified at trial therefore I am unable to that extent to assess their credibility or veracity of their evidence. **(See Dinkerrai Ramkrishna Pandya vs. Republic (1957) EA 336; Okeno vs. Republic (1972) EA 32).**

9. The Appellant having been charged with robbery with violence the Prosecution was duty bound to prove existence of ingredients of the offence. The Court of Appeal set out ingredients of the offence of robbery with violence in the case of **Oluoch vs. Republic (1985)** where it held that:

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> ***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(b) The offender is in company with one or more person or persons; or***
>
> ***(c) At or immediately before or immediately after the time of the robbery the offender wounds beats, strikes or uses other personal violence to any person……."***

10. Evidence adduced and not contradicted was that the persons who attacked PW1 and PW2 on the fateful night were two. One of the persons was armed with a panga. This kind of weapon can be adapted for use for causing any injury to a person therefore dangerous or offensive weapon **(See Section 89(4) of the Penal Code).**

11. Following the attack both PW1 and PW2 were injured. PW5 **Dr. Ann Vita Christopher** examined them and opined that they sustained harm. This was proof of actual violence having been used on them before the wallet which contained **Kshs. 500/=** was taken.

12. In identifying the Appellant as one of the perpetrators of the offence the Complainants stated that they knew him previously having been their employee. This was therefore a case of recognition.

13. In **Wamunga vs. Republic (1984) KLR 424** the Court of Appeal held:

> ***"It is trite law that where the only evidence against the defendant is evidence of identification of 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 possibility of error before it can safely make it the basis of a conviction."

14. In **Anjononi & Others vs. Republic (1976 – 80) I KLR 1566,** the Court of Appeal stated that:

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

15. The Appellant was identified by PW1 as the person who hit PW2 with a panga and the one who called out prior to the door being opened. On cross examination he said that the Appellant worked for his son previously therefore was known to them and they identified him by aid of the solar lights that were on.

16. PW2 who opened the door stated thus:

"…….as I opened the door the 1st Accused entered by force and Paulo Kitema came in, he got hold of my hands and a 2nd person came in. I did not know him, the first accused pushed me against the wall as the bangle he was putting on fell and he did not know …….. the 1st accused put a panga to my neck at the point my husband screamed."

17. PW3 saw two (2) people running away but she did not identify them.

18. PW4, **Benjamin Ngambi,** PW1 and PW2's workman did not identify the people because it was dark.

19. PW7 **No. 91707 P C John Kiketi** visited the scene of the incident on **22nd June, 2015.** It was his evidence that the Complainant later went with a wallet and bangle that was usually worn by the Appellant. What was not stated is what proved the fact that the bangle belonged to the Appellant. The Appellant was not arrested until **30th June, 2015.** No evidence was adduced to suggest why it took the police long to arrest the Appellant. In his testimony PW7 stated that he was arrested by **Corporal Matasio** at **Kisasi** who however did not testify. On cross-examination the Investigating Officer (PW7) stated that per his investigation the Appellant was positively identified. When the Appellant's co-accused who was acquitted cross examined him he stated that evidence adduced implicated him. Both PW1 and PW2 denied having seen the stated person who was jointly charged with the Appellant herein.

20. The only evidence that tended to connect him with the offence was that of PW6, **Mwangangi Ngilita** who stated that while drinking traditional liquor popularly known as **Karobo** with one **Kitemange,** he told him that it was the Appellant who committed the offence. He stated thus:

"On 28/6/2015 at 11.00 a.m. I was at Ndinda. I was with Kitemange, we were taking karobo. Kitemange started telling me about the accused he informed me that it was 1st accused had committed this offence, after that he run away, they attacked the complainant and run away to Kyangula. The 1st accused entered into the complainant's house attacked him and stole from him. The 2nd accused was not known. When I received this information I went and informed my boss. The 1st accused is Paul Kitemange Musingila. I assisted in the arrest of the accused persons, the 2nd accused was arrested at Ikanga."

On cross examination he responded thus:

"I came to arrest you because I was assisted by 2nd accused. There was enough light and the people you robbed saw you, after the theft we started looking for you. We did not come to your home. When you stole you went back to where you were working. The person you stole from was my grandfather when you stole with 2nd accused there is nothing you gave him he got angry and said what you had done."

21. I wish to point out that evidence adduced by PW6 leaves one wondering whether the information regarding the robbery was given to him by the Appellant or the person he was jointly charged with. The witness was not mentioned by the Complainants as having been present when the offence was committed.

22. Following what was stated on cross examination it would suggest that the person who gave him the information was not the Appellant but his purported accomplice. However in his evidence in chief he described the Appellant as **Paul Kitemange Musingila.** The question would be who was the person the Appellant was talking about. These were issues that should have been clarified at trial but were not. They left evidence distorted such that it did not make any sense.

23. What was however important was the fact that it was after PW6 received the information that he informed PW1 and he moved to assist in the arrest of the Appellant and another. The question begging is whether the police did not move to make any arrest prior to PW6 coming up with the information because they were not certain about the robbers.

24. PW3 and PW4 went to the scene soon on hearing PW1 and PW2 screaming. They saw the attackers running away but they did not identify the persons as it was dark. But at that point in time neither PW1 nor PW2 mentioned the Appellant as their attacker. The question would be whether indeed they recognized him as alleged?

25. In reaching the decision to convict the Appellant the learned trial Magistrate stated that the persons had not covered their faces. That the Appellant had worked for the Complainants therefore, he concluded that the Appellant was **Mukovi** who called out before the door was opened as he did not deny being **Mukovi** in his defence.

26. According to PW1 **Mukovi** had worked for them upto **2014** therefore they could easily identify him. What is interesting is despite that fact they did not notify the police at the outset the identity of their attacker. In the case of **Francis Kariuki Njuri & 7 Others vs. Republic Criminal Appeal No. 6 of 2007 UR** the Court stated thus:

> ***"The law on identification is well settled and this court has from time to time said that the evidence of identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see Republic vs. Turbull, (1976) 63 Criminal Appeal R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This court in Mohamed Elibite Hibuya & Another vs. Republic Criminal Appeal No. 22 of 1996 (unreported) held that:***
>
> ***'It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the suspicious details regarding his features given to any one and particularly to the police at first opportunity."***

27. Doubts were apparent in the case, to disapprove the defence put up that the Appellant was away from the locus in quo the Prosecution should have adduced evidence regarding the intensity of the solar lights that enabled the Complainant to see their attacker. Circumstances in which they were attacked may also have not favoured proper identification.

28. From the foregoing, it is apparent that the conviction was unsafe. Therefore the Appeal must succeed and is allowed. The conviction is quashed and sentence passed set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

29. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of July, 2017.

L. N. MUTENDE

JUDGE