REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.30 OF 2015 (CONSOLIDATING CRIMINAL APPEAL NOS. 30,31&32)

1.MOHAMED ABDI JALDESA................ APPELLANT

2. ABDULLAH ABDALAB BORU.............APPELLANT

3. BARAKO GODANA HALAKHE.............APPELLANT

VERSUS

REPUBLIC ……………………………….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.393 of 2015 of the Principal Magistrate's Court at Marsabit by Boaz M. Ombewa – Senior Resident Magistrate)

JUDGMENT

The appellants, **MOHAMED ABDI JALDESA, ABDULAHI ABDALAB BORU and BARAKO GODANA HALAKHE**, were Charged with an offence of robbery with violence contrary to section 295 as read with section 296 (2) of the penal code.

The particulars of the offence were that on 25th June 2015 at **Kaisut** area in Marsabit township within Marsabit County, they jointly robbed **DOYO DIDA GURUGURO** of Kshs. 30,000 and at or immediately before or immediately after the time of such robbery threatened to beat the said **DOYO DIDA GURUGURO** with a soda bottle.

The appellants were convicted of the offence and sentenced to suffer death as provided for by the law. They now appeal against both conviction and sentence.

Initially each appellant had filed own grounds of appeal which were all similar. When they instructed their current advocate, **M/S Thibaru**, she filed supplementary grounds of appeal for each appellant which were also similar. The four grounds are as follows:

1. .That the learned trial magistrate erred in law and in fact by convicting the appellants without sufficient evidence to warrant the convictions.

2. That the learned trial magistrate erred in law and in fact by failing to address his mind to the fact that the appellants could have been arrested as a result of mistaken identity.

3. That the learned magistrate erred in law and in fact by relying on the prosecution evidence that was full of inconsistencies and contradictions.

4. . That the learned magistrate erred in law and in fact by disregarding the appellants' defence.

The state opposed the appeal through **Mr. Mwangangi**, the learned counsel.

On the eventful day at about 1 pm, the complainant was walking home and on reaching near **Kaisut,** he was robbed by three people whom he contends are the appellants. The robbers ran away when he raised an alarm and members of public responded. Later the appellants were arrested, charged, tried and convicted. The convictions have given rise to this appeal.

In their defence the appellants contended that this was a case of mistaken identity and that the money they were arrested with was earned rightfully and that they had new clothes since it was Idd.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

It is trite law that whenever the issue of identification arise, care must be taken to ensure that no miscarriage of justice occurs.

There are several local decisions on this issue within our jurisdiction and which echo the celebrated decision of **R vs. TURNBULL [1976] 3 ALL ER 549** where Lord Widgery C.J held the following:

> **" Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. If in any case, whether being dealt with summarily or on indictment, the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of any description, the prosecution should supply them. Finally, the judge [1976] 3 All ER 549 at 550 Should remind the jury of any specific weaknesses which have appeared in the identification evidence (see p551 j to p 552 d, post).Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the**

identification."

In this case I will endeavor to find how each witness identified any of the culprits they allege were the appellants and establish whether there was a possibility of any error.

From the narration of the complainant we are able to surmise that he was walking alone prior to his attack and robbery. His attackers were three. One held him from the front, the other from the rear while the third one threatened him with a soda bottle. The first appellant removed money from his pocket. When he raised an alarm, the trio ran away. During his evidence in chief and cross examination, he said he had not known the appellants before the incident. Some crucial issues arise as to how this witness purportedly identified his attackers:

1.His narration of the incident draws a picture of a very quick operation of robbery and one is left wondering how he was able to identify any of his attackers. Certainly there was no possibility of him identifying the person who held him from behind. Without any evidence on the position of the person he claims was the first appellant whom he said had a bottle and with which he threatened him, it is not possible from the evidence to conclude that he must have seen him so as to be able to identify him later. The person who held him from the front was the only person whom he had a possibility of seeing and be able to later identify. However he did not describe him or any other culprit to the police or to those who went in answer to the alarm he raised.

It is therefore unsafe to rely on the purported identifications by the complainant.

2.The complainant kept referring the first appellant by one name; Mohamed. He did not tell the court how he came to know this name in view of his evidence that his attackers were not known to him before. Was this name probably given to him after the appellant's arrest? This was not clarified by any evidence and it is not safe to rely on it.

3. A careful perusal of the complainant's evidence indicate that at some instance during cross examination he said he knew the appellants .The prosecutor ought to have followed this in reexamination to establish what he meant. This was not done. It is not clear therefore whether he was contradicting himself or his was making some communication that did not become clear.

Some credibility issues do exist in this case. The complainant said that as he was going home, **Gurache, PW2** and his cousin were behind him. The evidence of **PW2** was that after he was informed that the complainant had sold his bull, he started going towards the market for they were going to make some purchases. This is when he saw the complainant being attacked. This places this witness in front of scene of crime rather than behind it.

The evidence of **Godana Duba Boru PW3** further complicated the prosecution case. He testified that he is a cousin of the complainant and at the time of the incident he was walking ahead of the complainant contrary to what the complainant testified to. If **Guracha Wario Jaldesa PW2** testified that **PW3** called him on phone so that they could go and do some purchases, one is left wondering why he **(PW3)** was leaving the market. There is a possibility that he conveniently testified to assist the complainant. The court of appeal in the case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JA held

"**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

In view of the contradictions introduced by these witnesses, it was unsafe to base a conviction on their evidence.

Arising from the same arguments it is not safe to conclude that they were able to identify any of the culprits for they did not give their (culprits') description to anybody before the arrest of the appellants to test their accuracy.

Before I conclude, I wish to comment on an issue the appellants had raised. They complained that the trial magistrate erred in law and fact for hearing the case within a very short period of 25 days. The learned trial magistrate ought to be congratulated for hearing the case within a short time. This is what the law requires.

The mere fact that the appellants were arrested while wearing new clothes does not make them offenders. The investigating officer ought to have investigated further to establish under what circumstances the clothes were bought. He failed to record the statement of the lady who purportedly sold the clothes. She would have shed some light to the case. The explanation by the appellants about the clothes and the money is plausible.

From the foregoing analysis , I find that it was unsafe to found a conviction on the evidence on record. Consequently, I allow the appeal, quash the conviction and set aside the sentence. The money and the clothes that were recovered from each appellant to be returned to him. Each appellant is set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 23rd day of March, 2016

KIARIE WAWERU KIARIE