REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 3 OF 2012

K T …..... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 563 of 2011 of the Chief Magistrate's Court at Malindi – D.W. Nyambu, SPM on 10th January, 2012)

JUDGMENT

1. The Appellant in this case KT was detained at the pleasure of the President of the Republic of Kenya on 10th January, 2012 for reasons that the Appellant was under the age of the 18 years when he was convicted with robbery with violence contrary to Section 296 (2) of the Penal Code.

PARTICULARS OF THE OFFENCE

2. The particulars of the charge were that on 26th august, 2011 in Kilifi County, the Appellant while armed with dangerous or offensive weapons namely a knife robbed Harrison Kombe Kalume of his motor cycle Registration No. KMCQ 046P Bajaj Boxer valued at Kshs.83,000/=.

3. A summary of the prosecution case was that the complainant in this case Harrison Kalume Kombe borrowed the motor cycle Registration KMCQ 046P from his brother (PW2) in order to ferry a client from Kwa Mayayo in Gede to Msabaha. While going back to Gede, he met 3 people at Kizingo. One of the people was a driver he had seen before, he told him to take the two people to Baraka Chembe.

4. The two people wanted the complainant to use a small footpath but he declined. One of the people called someone and asked if he could get the key. He told the complainant to go to Kwa Bomba Jimba for the key.

5. On the way to Kwa Bomba Jimba, the people dropped a bag. The complainant stopped and they picked the bag at Kwa Bomba, the complainant stooped and one of the people called and said they had arrived.

6. The complainant said that the phone of the man who had called went off. They asked for the complainant's phone and talked to a woman. The complainant gave her directions to the place they were.

7. The complainant said one of the people switched off the motor bike and kept the key. The complainant turned and saw both people holding knives. They told the complainant that if he wanted to be safe, he should leave the motor cycle.

8. They drove off on the motor cycle. After 15 minutes the complainant saw a motor cycle rider and they tried to pursue the robbers.

9. The complainant went to Watamu Police Station and reported the robbery. At 3 am the same day they arrested the Appellant. He still had the bag and inside the bag was one of the knives they had used to threaten the complainant. The Appellant told them the motor cycle was in the forest. They went to the forest but did not find it. They went to several places trying to arrest the other person but they did not find him. The Appellant was charged with this offence.

THE DEFENCE CASE

10. The Appellant said in his statement of defence that he was arrested while he was on his way home from a funeral. He said his age does not not allow him to commit such a serious offence.

11. The trial magistrate found the Appellant guilty as charged and ordered that the Appellant be held at the pleasure of the President (under Section 25 (2) of the Penal Code) for reasons that he was under the age of 18 years at the time he committed the offence.

12. The Appellant has now appealed to this Court against both the conviction and sentence on the following grounds:

GROUNDS OF APPEAL

i. That the learned trial magistrate erred in law and fact in finding the Appellant guilty on identification evidence tendered by PW1 without considering that the same mistaken identity.
ii. That the learned trial magistrate erred in law and fact by believing that the alleged bag and knife purported to have been recovered from the Appellant were not proved to be in the possession of the Appellant hence the sentence is unsustainable.
iii. That the learned trial magistrate erred in law and fact in failing to consider that Section 186 of the Children's Act was violated thus the sentence of Presidential pleasure was unsafe.
iv. That the learned trial magistrate erred in law and in fact to consider that Section 189, 190 and 191 of the Children's Act were not complied with thus the sentence herein is not legal.
v. That the learned trial magistrate erred in law and fact by not considering that the defence raised by the Appellant was reliable and also failed to award the Appellant the benefit of doubt.

13. The Appellant filed written submissions which he asked the court to rely on which were as follows:

THE APPELLANT'S SUBMISSIONS

i. That the evidence of identification which was relied upon by the trial magistrate was not founded within the required standard of law and that this is a case of mistaken identity.
ii. That the Appellant was under the age of 18 years at the time of the trial and he was not represented by a legal counsel as mandated by the Children's Act No. 3 of 2001 (Section 186 thereof).
iii. That the trial magistrate acted contrary to Section 189, 190 and 191 of the Children's Act in that she used to words “conviction” and sentence and she detained the Appellant contrary to Article 53 (1) of the Constitution which says that no child should be detained except as a measure of last resort.
iv. That the Appellant's defence was not considered by the trial magistrate.

14. The Respondent responded to the Appellant's submissions orally in court as follows:

THE RESPONDENT'S SUBMISSIONS

i. That the offence was proved to the required standard since the Appellant was arrested 4 hours after the robbery.
ii. That the evidence of the complainant was corroborated by that to PW2 who participated in the arrest of the complainant and the Appellant took them to the place they had kept the motor cycle but they did not find it.
iii. That the trial magistrate warned herself of the dangers of relying on the identification of one witness and she was absolutely sure that the identification was without errors.
iv. That the trial magistrate considered the defence by the Appellant and found it to be a mere denial.

THE COURTS' FINDINGS

15. This is the first court to deal with the appeal. In the case of **OKENO V. REPUBLIC [1972] EA 32**, the role of the first Appellate Court is given as follows:

> **"An Appellant on 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 to 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. REPUBLIC [1957] EA 570). It is not the function of a first Appellate Court ;merely to scrutinize the evidence to see if thee was some evidence to support the Lower Court's findings and conclusions; 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 PETER VS. SUNDAY POST, [1958] EA 424)."**

16. Our duty was also stated in the case Isaac **NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA VS. REPUBLIC Criminal Appeal No. 272 of 2005** as follows: -

> **"In the same way, a court hearing a first appeal (i.e. a first Appellate Court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first Appellate Court would give allowance of the same. Thee are now a myriad of case law on this but the well-known case of OKENO VS. REPUBLIC [1972] EA 32 will suffice. In this case, the predecessor of this court stated: -**
>
> **"The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA VS. REPUBLIC [1975] EA 57). It is not the function of a first Appellate Court merely to scrutinize the evidence to see if thee was some evidence to support the Lower Court's findings and conclusions; 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."**

17. The main ground of appeal is that the identification of the appellant was not proper. This was considered by the Court of Appeal in the case of **JOHN NJERU KITHAKA & ANOTHER VS. REPUBLIC Criminal Appeal No. 436 of 2007**. The court stated as follows:

> **"... On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable...."**

18. We find that the circumstances under which the appellant was arrested were unfavourable for proper identification. The incident occurred at 9.45 pm at night and the appellant was arrested 4

hours later. The circumstances were not favourable for proper identification.

19. We also find that this is a case of a single identifying witness and the said testimony of PW1 requires corroboration. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The court held as follows: -

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witlessness 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."**

20. Before the trial court, PW1 Harrison Kalume Kombe was the complainant. A summary of his evidence is that on 26th August, 2011 at about 9.45 pm he was operating a boda boda motor cycle. He served two clients at Kizingo area and they were heading to Baraka Chembe area. On the way, they dropped a bag, switched off the motor cycle and threatened him with knives.

21. It is PW1's evidence that the robbers drove off with the motor cycle. He reported the matter at the Watamu police station. On the same time, he decided to go on patrol with his brother PW2. They found the Appellant carrying a bag. The bag had a knife. He identified the Appellant as one of the robbers.

22. PW2 FWAHA JAMES KOMBE is a brother to PW1. On 25th August, 2011 PW1 called him at about 10.00 pm informing him that he had been robbed of a motor cycle. He joined PW1 and they went on patrol. They saw the Appellant walking towards Watamu. PW1 recognized the Appellant as one of the suspect. The Appellant had a bag which had a knife. They arrested the appellant and took him to the owner of the motor cycle.

23. PW3 GEORGE KALAMA KARISA is the owner of the motor cycle that was under the care of PW1. He produced ownership document. The robbery was reported to him on 25th August, 2011 by PW2 at 2.00 am. After about 30 minutes the Appellant was taken to him by PW1 and PW2. He reported the matter to the police at Watamu.

24. P.C. JACKSON KINYUA was PW4. He was based at the Watamu police station. On 26th August, 2011 a report was made about the robbery. They went and found the Appellant had been arrested by members of the public. They re-arrested the Appellant.

25. PW5 CORPORAL BERNICE TONUI was also stationed at the Watamu police station. He investigated the case and had the Appellant charged with the offence.

26. In his unsworn defence, the Appellant testified that on 25th August, 2011 he was from funeral heading home when three people arrested him. They told him that they had been robbed of a motor cycle. He was taken to Watamu police station and later charged with the offence. He denied committing the offence.

27. We find that the conviction is not safe. We allow the appeal and set aside the sentence imposed by the trial court.

28. We further order that the Appellant be set at liberty unless lawfully held for any other reason.

Dated, signed and delivered at Malindi this 26th day of April, 2016.

S.J. CHITEMBWE **ASENATH ONGERI**

JUDGE **JUDGE**