



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.13 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. J. Karanja – PM

delivered on 15th January 2015 in Nairobi CM.C. CR. Case No 731 of 2013)

GEORGE KAMAU NDUNGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, George Kamau Ndungo was charged with three others (who were however acquitted) with **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 6th May 2013 at Co-operative Bank along Nanyuki Road, Industrial Area, Nairobi County, the Appellant, jointly with others not before court, while armed with pistols, robbed David Kipkoech Bett of Kshs.181,000/- and a mobile phone make Samsung E1055 and at or immediately before or immediately after the time of such robbery used actual violence to the said David Kipkoech Bett. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. 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 basis of identification made by a single witness in circumstances that raised doubt that he was properly identified. The Appellant faulted the trial magistrate for convicting him on the basis of the said evidence of identification yet the description of the assailant was not given by the complainant in the first report that was made to the police. He was aggrieved that the trial court had upheld the evidence of identification yet no police identification parade was held to confirm his alleged identification by the complainant. The Appellant took issue with the fact that his defence had not been considered before the trial court convicted him. For the above reasons, 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 the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. Ms. Aluda for the State conceded to the appeal. She submitted that the trial court relied on evidence of a single identifying

witness which was riddled with inconsistencies that raised reasonable doubt as to the said identification of the Appellant. She explained that, taken into totality, the evidence adduced against the Appellant did not establish the guilt of the Appellant on the charge brought against him to the required standard of proof beyond any reasonable doubt. She therefore urged the court to allow the appeal.

Before giving reasons for its determination, it is imperative that the facts of this case be set out, albeit briefly. The complainant in this case, David Kipkoech Bett (PW1) was at the material time the Chairman of the Organizing Committee of a SACCO at his place of employment at Industrial Area. On 6th May 2013, at about 3.00 p.m., he went to Co-operative Bank Industrial Area Branch to withdraw money for the members. He withdrew the sum of Kshs.179,700/-. He put the money in coat and trouser pockets. His place of work was about two (2) kms from the Bank. He told the court that as he was walking towards his place of work, he was stopped by men in a grey motor vehicle. He identified the motor vehicle as a Toyota Saloon. He did not give the identification number of the motor vehicle. A gun was pointed at him before he was dragged into the motor vehicle. He was handcuffed. His face was covered. The men in the car were four (4) in number. They told him that they were members of the Flying Squad. He was beaten thoroughly before he was robbed of the money and his mobile phone. He testified that he was driven for about two (2) hours before he was dumped in a bush. When the motor vehicle left, he saw a boda boda rider pass through the road. He inquired from him where he was. He was told that he was at a place near Daystar University Campus at Athi River. The complainant was bleeding from the injuries that he had sustained from the beating. The boda boda rider took him to the Administration Police Post near the University. He made a report of the robbery. His colleagues at work collected him from the University and had him admitted at Shalom Hospital. He was admitted for three days before he was discharged.

The complainant testified that in the course of the robbery ordeal, he was able to identify his assailants. However, it was clear that in the first report that he made to the police at Athi River Police Station and at Industrial Area Police Station, he did not give the description of the persons who robbed him to the police. The complainant testified that on 9th May 2013, he went to Industrial Area Police Station to record his statement. He was told that the officer who was to record his statement was not present at the time. He decided to go to the Safaricom shop along Kenyatta Avenue in town to replace his SIM Card. He told the court that as he was walking along Ronald Ngala Street towards Moi Avenue, he saw a grey motor vehicle. This is what he said:

“I saw a grey car like the one (that) had taken me. I had not taken the registration number of the vehicle on that day of the robbery but when I saw it, I felt something and was shocked. I looked at the driver and he was shaved like a policeman. I had not seen the driver during the day so I went past and when I looked in the passenger in front it was the same man who was seated in front on that day.”

The complainant testified that he noted the registration number of the motor vehicle (KAT 277E) and went to Industrial Area Police Station where he made a report of his discovery. Apparently, the police did not take action immediately. The complainant informed one Julius Kiprono Rotich, a village mate who was a member of the Flying Squad.

On 24th May 2013, the complainant was called by the said Julius Kiprono Rotich and informed that the motor vehicle had been found with four (4) men inside it. The motor vehicle was parked outside Co-operative Bank, Industrial Area Branch. The said Julius Kiprono Rotich invited him to the scene to see if he could identify the persons who had robbed him. The complainant rushed to the scene and saw the Appellant and his three co-accused. He identified all of them as the members of the gang who robbed him. The Appellant and his three co-accused were arrested and taken to Industrial Area Police Station. Nothing that was robbed from the complainant was recovered in their possession. An identification parade was later held where the complainant purported to have identified two of the Appellant's co-accused as the persons who robbed him. In this court's considered opinion, the holding of the said identification parade did not add any value to the case because the complainant had on the previous day been exposed to the Appellant and his co-accused. In any event, the officer who conducted the identification parade was not called to testify in the case.

It was on the basis of this evidence of identification that the Appellant was convicted. When he was put on his defence, the Appellant explained that on the material day of 24th May 2013 he was at Co-operative Bank Industrial Area to meet a prospective client who wanted to buy a plot from him. He arrived at the Bank at about 3.30 p.m. He waited for the client. He was therefore surprised when a man introduced himself as a police officer arrested him and took him to Industrial Area Police Station. He denied committing the offence. It was his evidence that he was a victim of mistaken identity.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the **Court of Appeal in Njoroge – vs- Republic [1987] KLR 19 at P. 22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v. R [1957] e.a 336, Ruwalla v. R [1957] E.A 570)”.

The issue for determination by this court is whether the prosecution adduced sufficient culpatory evidence to convict the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** that was brought against him.

As stated earlier in this judgment, the Appellant was convicted on the sole evidence of a single identifying witness. The law regarding the receiving of such evidence by the trial court is well settled. The court must warn itself of the danger of convicting an accused person on the basis of the evidence of identification by a single witness especially when the identification is made in circumstances that did not favour positive identification. The court is required to interrogate the evidence adduced in that regard to exclude the possibility that such evidence of identification is tainted with error. This is because, in many instances, identification made in the hectic circumstances of a robbery, where the identifying witness may be under extreme stress or is in fear for his or her life, may be honest but mistaken that he or she has identified the accused as the person who robbed him.

There are certain safeguards that have been put in place by judicial precedent to address shortcomings that are inherent in identification during robberies. The safeguards include, the requirement that where the prosecution is relying on the evidence of identification, it is imperative that a description of the robber or assailant be made by the complainant in the first report that is made to the police. The source of light, where the robbery takes place at night must be explained. The position of the victim of the robbery *vis-à-vis* that of the robber must be spelt out. The period of exposure of the victim to the robber must be stated. If there was more than one robber, the role that each robber played in the robbery should be explained.

The description made will aid the police to determine whether a future identification made in a police identification parade tallies with the description made in the first report to the police. Such description may include the height, weight, complexion, and the clothes that the robber or the assailant wore at the material time, the manner of speech and any other features that may distinguish the robber or the assailant. Where there is doubt that such identification is not free from the possibility of error, then, other evidence is required to be adduced to corroborate the said evidence of identification before a conviction can be sustained (See **Maitanyi –vs- Republic [1986] KLR 198.**)

In the present appeal, it was clear that the trial court fell in error when it convicted the Appellant on the sole evidence of identification by the complainant. From the evidence adduced by the complainant, it was apparent that he did not have time to properly identify the persons who robbed him because he was accosted and immediately bundled into the motor vehicle. A gun was pointed at him. While inside the motor vehicle, he was beaten senseless before his face was covered. He was stepped on at the rear seat of the motor vehicle before he was abandoned about (1?2) one and half hours later at a bush near Daystar University Campus at Athi River. The complainant was seriously injured that he required hospitalization

for three (3) days. Crucially, the complainant did not give the description of the robbers in the first report that he made to the police. He did not give the police the registration number of the motor vehicle that he was bundled in by the robbers. It was only a few days later that he purported to identify the motor vehicle. This court wondered how the Appellant was certain that the particular motor vehicle that he saw along Ronald Ngala Street in Nairobi was the same one that the robbers used if he had not given the peculiar identifying marks of the motor vehicle in the first report that he made to the police. It was not enough for the complainant to say that the motor vehicle was a grey Toyota Saloon. There are many grey Toyota Saloons in Nairobi.

The evidence of identification, taken into totality is not water tight and free of error as to support the conviction of the Appellant. The Appellant may well be a victim of mistaken identity. This court is satisfied that the complaint raised by the Appellant that the evidence of identification was not sufficient to convict him has merit. It cannot be ruled out that the complainant honestly, but mistakenly, thought that he had identified the Appellant as a member of the gang that robbed him. The prosecution, correctly in this court's opinion, conceded to the appeal.

In the premises therefore, the appeal lodged by the Appellant is allowed. His conviction on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** is quashed. The Sentence imposed on him is set aside. The Appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF MAY 2016

L. KIMARU

JUDGE