REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.133 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. Nyakundi (Mrs.) – PM delivered on 12th May 2011 in Kibera CM. CR. Case No.3606 of 2009)

DENNIS OCHIENG OMONDI…..…………………………………….APPELLANT

VERSUS

REPUBLIC………………………………………………………........RESPONDENT

JUDGMENT

The Appellant, Dennis Ochieng Omondi was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 9th August 2008 at Mirichu Village, Ongata Rongai in Kajiado County, the Appellant, jointly with another not before court, while being armed with dangerous weapons namely hammers and iron bars, robbed Anthony Mbugua Nyoro (the complainant) of cash Kshs.30,000/-, a Nokia mobile phone, personal documents and keys all valued at Kshs.46,600/- and at or immediately before or immediately after the time of such robbery wounded the complainant. 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 appealed to this court.

In his amended petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted yet the evidence adduced pointed to one "Dan" and not the accused Dennis Ochieng Omondi as the person who had committed the offence. He faulted the trial magistrate for convicting him on the basis of the evidence of identification that did not stand up to legal scrutiny. In particular, he took issue with the fact that the trial court had relied on the evidence of police identification parade yet the identifying witnesses who testified told the court that they knew or had known the Appellant before the material day of the incident. In essence, the Appellant was saying that the circumstances under which the alleged identification was made was not satisfactory as key actors who were allegedly present prior and during the incident were not called to court to testify. The Appellant complained that the police did not investigate every angle of the case, including whether the worker who was employed by the complainant was involved in the incident, before convicting the Appellant. The Appellant was of the view that the evidence adduced against him, taken into totality, was contradictory, uncorroborated and raised suspicion that he was being framed for an offence that he did not commit. The Appellant stated that the evidence adduced by the prosecution witness did not establish his guilt to the required standard of proof. 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, this court heard submission made by Ms. Nyang' for the Appellant and by Ms. Aluda for the State. Ms. Nyang' submitted that the charge sheet on which the Appellant was convicted was defective. The evidence adduced by the prosecution witnesses referred to the Appellant as "Dan" yet such name did not appear in the charge sheet. Secondly, she submitted that the evidence of identification was not properly analyzed by the trial court in that it was not clear from the evidence how the complainant, his worker and son would be certain that he was the one who had attacked and robbed the complainant if the evidence of the prior contact had not been established. She submitted that evidence was adduced to the effect that the complainant had called "Dan" that morning yet no evidence of the mobile phone number was adduced into evidence. If that had been done, then it would have been established whether or not the Appellant was the owner of the particular mobile number. She stated that crucial witnesses were not called to testify in the case. In particular, she submitted that one Michael and Tosh were not called to testify in the case. In respect of Michael, the police confirmed that he had recorded a statement. The complainant testified that it was Michael who had introduced him to "Dan". She was of the view that Michael should have been called to testify in the case to corroborate the evidence of the complainant as to the circumstance of his introduction.

She took issue with the manner in which the case was investigated. In particular, she submitted that the role played by the worker of the complainant called Mwololo was not properly investigated. The said Mwololo had been arrested and then later released. She urged the court to take into consideration the circumstances under which the Appellant was arrested. She explained that the Appellant was arrested for another offence, which was investigated and later established not to have any foundation. It was when he was about to be released that he was re-arrested for the present offence and later charged. She urged the court to take the totality of the evidence adduced particularly, the evidence adduced by the Appellant in his defence and reach a finding that he was innocent. She faulted the manner in which the police identification parade was conducted. She stated that if the complainant knew the Appellant prior to the robbery incident, it was not necessary for the police to conduct an identification parade. In the premises therefore, the Appellant urged the court to allow the appeal.

In response, Ms. Aluda for the State conceded to the appeal. She submitted that the charge was indeed defective because the name "Dan" should have been included as an alias in the charge sheet. The P3 form that was relied to convict the Appellant was filled two (2) years after the incident. No reason was advanced for the delay. No medical evidence was produced from Karen Hospital where it was alleged that the complainant had been admitted. She stated that the evidence adduced by the complainant regarding the circumstance under which he identified the Appellant did not stand up to legal scrutiny because he did not describe the other person who was allegedly with the complainant at the time of the robbery incident. She further stated that although the police parade identification forms were produced in respect of PW3, PW3 did not state in her evidence that she had attended any such parade.

She took issue with the manner in which the said identification parade was conducted. She was of the view that the presence of the investigating officer during the identification parade invalidated the identification made from such parade. She submitted that the telephone records should have been produced to confirm the communication between the complainant and the Appellant, if any, during the alleged robbery incident. She submitted that the hammer which was allegedly used to attack the complainant should have been dusted for fingerprints and bloodstains taken for analysis. She was of the view that the evidence adduced by the complainant was that of a single identifying witness which should have been treated with caution by the trial court. In the premises therefore, she urged the court to allow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court so as to arrive at an independent determination whether or not to uphold the conviction of the trial court. in doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified during trial and cannot therefore give an opinion as to the demeanor of the said witnesses (**see Okeno –vs-Republic [1972] EA 320**). 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**.

Before giving reasons for its determination, it is imperative that the facts of the case be set out, albeit briefly. The complainant in this case was constructing a house at Murichu area in Ongata Rongai. The construction had reached the stage where tiles were to be laid on the floor. He testified that the contractor of his house at the time was one Michael. Michael introduced him to "Dan" Ochieng whom he pointed out as the Appellant in this case. He recalled that on 9th August 2008, he called the Appellant to the house to complete the work of tiling the house. He went to the house with his son PW3 Waynn Nyoro Mbugua who was aged 12 years at the time. From his testimony, it was clear that the complainant knew the Appellant well before meeting him on the fateful day of 9th August 2008. The complainant testified that he interacted with the Appellant several times before the particular day. PW3 testified that when they went to the house with the complainant on the material day, the complainant showed the Appellant the work that he was to do. They delivered cement to the house for the Appellant to undertake the work. PW3 recalled that his younger brother became restless thus forcing the complainant to take him back to the house that they were residing in at the time. This house was not far away from the construction site. While at home, the complainant testified that the Appellant called him and requested him to take to him spacers. The spacers were required for tiling purposes. Apparently, the complainant had forgotten to buy them. PW3 told the court that he was the one who received the call from the Appellant. This was because, at the time, the phone was near the place that he was seating. Upon receiving the call, he gave the phone to the complainant. That the Appellant received this call was also corroborated by PW2 Jennifer Wanjiru Mukinju, the wife of the complainant.

Upon receiving this call, the complainant left home and went to purchase the spacers from a hardware. He recalled that he then went to the construction site where he met the Appellant and another man. While at the site, he testified that he was attacked by the Appellant using a hammer. He was attacked from behind. He was severally hit on the head and face in the attack. He lost consciousness. He came to after three days when he was admitted at Karen Hospital. He was hospitalized for two weeks before he was discharged. According to PW9 Dr. Zephania Kamau, the injuries that the complainant sustained were as follows:

He had a left sided facial palsy, he had a hypertrophic scar anterior to the left ear: the complainant could not be able to close his left eye, he sustained a depressed skull fracture, fracture of the left mandibular Condyle (left lower jaw), dislocation of the left axillary zygomatic bone and fracture of the left index finger. The degree of injury was assessed as grievous harm. The duly filled P3 form was produced as an exhibit in the case.

PW5 Benson Mwololo testified that at the material time, he was employed as a caretaker by the complainant. He took care of the complainant's house which was under construction. During daytime, he left the house to look for casual work elsewhere because the money that he was being paid as a caretaker was not sufficient to sustain him. He recalled that on 8th August 2008, the complainant called him and requested him to give him the number of **"**Dan". He identified "Dan" as the Appellant in this case. He testified that the complainant knew Appellant because he had previously worked at the construction site. The Appellant was introduced to the complainant by Mike (Michael) Odero who had been previously been employed as a contractor. On the following day i.e. 9th August 2008, he left the compound and went to look for casual work within the neighbourhood. When he returned, he found the complainant's car parked outside the compound. He knocked at the house but did not get any response. He had spare keys to the house. He went and opened the house. He found the complainant lying on a sofa set while covered with a bloody sheet. He was unconscious. He called PW2 and informed her of what had transpired. Arrangements were made whereby the complainant was rushed to Karen Hospital where he was admitted. PW5 testified that he knew the Appellant as "Dan". This was because the Appellant was one of the artisans who had been employed by the contractor to work in the construction of the house.

The complainant testified that when he regained consciousness, he realized that he had been robbed of Kshs.40,000/-, his ATM Card and several documents which were in his wallet. The matter was reported to PW4 Sergeant Samuel Kinyua who was then based at Murichu AP Post. He informed the police who visited the scene. The case was initially handled by PW7 PC Kimathi Mutitho then based at Ongata Rongai Police Station before the investigations were taken over by the CID based at the same police station. PW6 Sergeant Rogers Ndoi and PW8 PC William Makombo investigated the case. The investigating officers retrieved a hammer, which was bloodstained from the scene of the robbery after the

report of the crime had been made. The hammer was produced into evidence by the prosecution. They narrated how after the incident, the Appellant disappeared. He was arrested one (1) year later when he was re-arrested at Muthaiga Police Station where he had been arrested for an unrelated offence. After his arrest, a police identification parade was mounted at Ongata Rongai Police Station. The parade was conducted by CIP Nyaga. The complainant and PW3 pointed out the Appellant in the identification parade. Although CIP Nyaga did not testify, the police identification parade forms were produced into evidence by the investigating officer. The Appellant who represented by counsel at the time, did not object to its production. After completing investigations, the police formed the view that a case had been made for the Appellant to be charged with the offence which he was convicted.

When he was put on his defence, the Appellant denied committing the offence. Other than explaining the circumstances of his arrest and the conduct of the identification parade (which he faulted as having been irregularly conducted), he did not at all touch on the evidence that was adduced against him by the prosecution witnesses.

The Appellant was essentially convicted on the evidence of identification. According to the Appellant, this evidence was faulty in the sense that certain aspects that would have confirmed the allegations made by the prosecution witnesses that they had identified him were left hanging. Having carefully re-evaluated the evidence adduced by the prosecution witnesses in regard to the evidence of identification, this court was convinced to the required standard of proof beyond any reasonable doubt that the complainant (PW1), his son (PW3) and his caretaker (PW5) identified the Appellant as the person who was last seen with the complainant before he was assaulted and robbed. The narrative given by the prosecution witnesses give a specific timeline which give the sequence of events that took place between the time the complainant contacted the Appellant on phone and time of the robbery.

The complainant and PW5 testified that the Appellant was known to them prior to the date of the robbery incident because he was one of the artisans (fundis) who had been employed by one Michael to work at the site. It was obvious from the evidence that the complainant and PW5 had interacted with the Appellant prior to the fateful date. PW5 testified that on 8th August 2008, a day prior to the robbery, the complainant called him and requested to be given the Appellant's mobile number. PW5 duly obliged. The complainant called the Appellant and requested him to meet him at the construction site on the following day. The Appellant was with his three sons, (including PW3) when he went to the site and met with the Appellant. The Appellant was with another man. The complainant left the site and went home when the youngest child became restless. While at home (which was not far away from the construction site), the Appellant called him. The call was received by PW3 before he handed the phone to the complainant. The complainant testified that the Appellant requested him to deliver spacers to enable him tile the house. The complainant obliged. He left his home. He purchased the spacers from a nearby hardware. He went back to the construction site. He found the Appellant with the other man. He testified that while he was facing away, the Appellant attacked him with a hammer. He saw the Appellant attack him before he lost consciousness.

The Appellant argued that the evidence of identification was not watertight nor was it sufficiently corroborated. Upon re-evaluation of the evidence adduced by the prosecution witnesses, this court noted that the robbery incident took place in broad daylight. The circumstances favouring positive identification were therefore present. The complainant and the Appellant interacted at close quarters. It was the complainant who allowed access to the Appellant and his accomplice to the house which was under construction. If there is any doubt that the complainant knew the Appellant prior to the robbery incident, that doubt was removed when PW5 confirmed that he was the one who had given the mobile number of the Appellant to the complainant. The Appellant responded to the request made by the complainant to avail himself for the work. PW5's testimony therefore corroborated the complainant's testimony regarding the identification of the Appellant.

In any event, this court is of the view that the evidence adduced by the complainant and PW5 is that of recognition rather than being merely of identification. As was held in the case of **Anjononi –Vs-Republic [1980] KLR 54 at P.60**:

> ***"Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other."***

In the present appeal, it was clear that the complainant and PW5 personally knew the Appellant before the robbery incident. There is no reason discernable from the evidence adduced before the trial court that would lead this court to reach the conclusion that the complainant and PW5 were motivated by anything else other than telling the truth when they testified before court. This court therefore holds that the prosecution adduced sufficient evidence, on evidence of recognition, to the required standard of proof beyond any reasonable doubt that the Appellant robbed the complainant, and in the course of that robbery wounded him and caused him to sustain injuries of a life changing nature.

The other issue for determination is whether the charge brought against the Appellant was defective by virtue of the fact that the charge sheet did not state the alias "Dan" in describing the Appellant. Having re-evaluated the evidence in that regard, this court formed the opinion that the failure by the prosecution to state the alias "Dan" in the charge sheet was not fatal to the prosecution's case. This is because the identifying witnesses clearly testified that the Appellant referred to himself as "Dan" when he introduced himself to them. PW5 referred to the Appellant as "Dan" Ochieng. Ochieng is the middle name of the Appellant. Irrespective of whether the name "Dan" appeared in the charge sheet, it was apparent to this court that the complainant, and PW5 had no doubt that the person they were referring to as "Dan" was the Appellant because they had previously interacted with him. Nothing turns on this ground of appeal.

As regard to the complaint by the Appellant that critical witnesses were not called to testify in the case, this court is of considered opinion that the prosecution was only under an obligation to produce witnesses that are able to prove its case. In the present case, the witnesses who were called to testify establish the prosecution's case to required standard of proof. Nothing prevented the Appellant from calling those mentioned by the prosecution witnesses to testify in his defence. Further, nothing prevented the Appellant from requesting the court to have the particular witnesses called during the trial.

As stated earlier in this judgment, the Appellant did not adduce any evidence to challenge the evidence adduced against him by the prosecution.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. Although the State conceded to the appeal, this court is of the view that, on independent re-evaluation of the evidence adduced before the trial court, the shortcomings mentioned by the State is not sufficient to warrant this court to upset a decision which was reached on the basis of strong culpatory evidence that irresistibly connected the Appellant to the crime. The conviction and sentence of the Appellant by the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF MAY 2016

L. KIMARU

JUDGE