REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 3 OF 2014

(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 2931 of 2013 S. Mwinzi, Ag.SRM)

JOHN GITHIRE WAINAINA……...APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. On the night of 7th December, 2013 the Complainant **Stephen Kamuhuro Ichoro (PW1)** retired to bed at his house in Kijabe with his wife **Margaret Wanjiru (PW2)**. At 1.00am robbers broke into the house and after assaulting the Complainant robbed him of a phone and Ksh 7,000/=. They grabbed keys to his shop and stole therefrom assorted goods worth Kshs 12,790/= before vanishing into the night.

2. PW1 made a report to police on the next day. At about 3.00pm of the said date the Appellant was rescued by **CPL Alex Partoip (PW3)** from a mob that was assaulting him at Maai Mahiu town on suspicion of theft. He was escorted to the police station. The Complainant identified him as one of the robbers to police and he was charged.

3. In his sworn defence statement the Appellant claimed that there existed a grudge between him and the Complainant in respect of a transaction involving illicit forest produce. That following arrest by Forest Guards, the Complainant demanded compensation from the Appellant because forest guards had forced him to pay for the transport of forest goods collected by the Complainant from the Appellant's home.

4. The Appellant was unable to make a refund and on 7th December, 2013, the Complainant in the company of others attacked the Appellant who was rescued by Administration Police Officer then handed over to **PW3**. He denied committing the robbery at the Complainant's house. He was found guilty, convicted and sentenced to death.

5. The Appellant raised seven amended grounds of appeal, the key ones being number 3 and 4 of which are to the effect that:-

> **"3) THAT he erred in law and facts in not finding that the conditions prevailing at the *locus in quo* and the alleged light were not conducive for a positive identification of the assailants.**
>
> **4) THAT he erred in law and facts in not finding that PW1 was not a credible witness due to the inherent disparities and contradictions in his evidence."**

6. His arguments on the above grounds are contained in his written submissions. Upon which he relied during the hearing of the appeal. The Appellant challenged his identification by **PW1** by the light of the pad of a mobile phone. He questioned the intensity of the light and the fact that it was not indicated how long the witness had the robber(s) in observation. Moreover, he contended that there was no proof of the existence of the Complainant's phone as no receipts were tendered at the trial.

7. Regarding the fourth ground, the Appellant highlighted what he called inconsistencies which in my view were matters related to the identification of the robbers by the Complainant.

8. The appeal was opposed by the Director of Public Prosecutions through Miss Waweru. She asserted that the Appellant was well known to the Complainant and that the witness saw the Appellant's face through the light of the phone key pad. Further that the robber took some time and **PW2** was also able to identify the Appellant who was named to police during the first report to **PW4**. It was submitted that the trial court properly directed itself in analyzing the evidence.

9. Regarding contradictions attributed to the Complainant Ms Waweru dismissed them as insignificant and not going to the roof of the evidence by **PW1**.

10. The duty of the first appellate court was spelt out in **Okeno -Vs- Republic [1973] EA 32**, as hereunder:-

> **"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- R [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 conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there 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 Peters –Vs- Sunday Post [1958] EA 424."**

11. I have considered the evidence tendered at the trial and the rival submissions. In my considered view, this appeal turns on the question of identification as raised in ground 3 and 4 more than any other issue.

12. First of all, the trial court stated as a fact in the judgment that **PW2** knew the Appellant. The record of **PW2's** evidence shows otherwise while she stated obliquely in her evidence-in-chief that:

> ***"……I saw his face. I knew him (robber)."***

In cross-examinations she stated that

> ***"I saw the face of the Accused when he pressed the phone buttons. I did not know him before."***

This inconsistently and the fact that **PW2** did not explain how he knew the Appellant introduces doubt in her evidence. The trial court therefore should have treated that evidence with circumspection.

13. For his part, the Complainant was undisputedly known to the Appellant prior to the robbery. And though this was a case of recognition, the trial court needed not only to warn itself but to consider the evidence carefully to assure itself that the evidence was free of error as stated authorities cited in the judgment of the court. The court was effectively dealing with evidence of identification by a sole witness at night, allegedly through the light emanating from a key pad of a phone.

14. In the case of **Abdalla Bin Wendo & Another –Vs- Republic [1953] 20 EACA166,** the Court of Appeal for Eastern Africa stated that;

> **"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness *but his rule does not lessen the need for testing with the greatest care the evidence of a single witness 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 testimony of a single witness, can safely be accepted as free from possibility of error." (Emphasis added).**

15. The Court of Appeal reiterated the need for caution in the dealing with identification in difficult circumstances by stating in **Joseph Muchangi Nyaga & Another -Vs- Republic (2013) eKLR** that:-

> **"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"**

16. In dealing with the identification evidence in this case, the trial court observed that:-

> ***"As noted above, both PW1 and PW2 have said they knew the Accused. He was a former classmate of the Complainant and they hailed from the same village. I find, after warning myself of the possibility of error by the witnesses that the recognition evidence consistent and cogent. This clearly places the Accused at the scene of attack."***

With that conclusion the trial court proceeded to discard the Appellant's defence.

17. With respect, the Complainant's evidence did not in any way give a detailed description of the circumstances in which he identified the Appellant, beyond citing light from a phone key pad. He did not describe the intensity of the light emanating from his phone key pad, how far it was from the face of the Appellant and how long the light remained on to facilitate identification. But it would seem that there was merely a fleeting view of the robber because from **PW1's** evidence was that, as soon as he saw the face the robber put the phone inside his pocket and started demanding for money.

18. And while there was a conversation between the two men, the witness did not say in his evidence that he identified the robber by voice as the Director of Public Prosecutions has asserted. Even so voice identification must meet the standard set out in **Choge -Vs- Republic (1955) 1KLR:-**

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

19. I have already said that the testimony of **PW2** on identification is wanting. Thus the conclusion by the trial court that the Appellant was positively identified or recognised by the Complainant couple is not based unsound evidence. Had the court considered properly the question of the lighting and opportunity for identification, it would have come to a different conclusion. The foregoing is by the questions raised in ground number 4.

20. There is no direct evidence to show how the Appellant was identified for arrest. **PW1** was at pains to distance himself from the mob that attacked the Appellant on the day of his arrest. It is true that the Appellant was arrested on 7/12/2013 within Mai Mahiu town by **PW3**, but not in connection with the

robbery. **PW3** did not say so. The investigating officer **PC Charls Njuru (PW4)** was not the person who received the first report by the Complainant. He stated *interalia* that:

> ***"On 7/12/2013 I was at the station. I got OB report of the Complainant. It was a robbery reported on the previous day……I investigated and recorded statements. I visited the scene and saw the Complainant …….i gave him a P3 form. While at the station the Accused was brought by an Administration Police Officers ……Complainant said he knew him."***

21. It is not clear how the Complainant knew the suspect was in custody or how he identified him. Certainly, it was not at the time of arrest. Was it by happenstance that the suspect of theft rescued from a mob turned out to be robber named by the Complainant? This is a significant gap that was left open by the prosecution evidence. It is telling that during cross-examination PW1, said that he had stated in his statement to police that he was

> ***"the one who raised an alarm for you be arrested."***

22. This contradicts his evidence-in-chief where he had asserted that:-

> ***"Later I was called and told the Accused was arrested. I told the police I knew the person."***

These inconsistencies further raise doubt regarding how the Accused was identified for arrest. After all, there was seemingly no other complainant in relation to the allegation of theft which led to his near-lynching at Maai Mahiu town.

23. The Appellant's defence did not amount to much and sounded incredulous. Irrespective of its defence weakness, the onus lay in the prosecution to prove its case beyond reasonable doubt. On my part, having reviewed the identification evidence I am not satisfied that the identification evidence was watertight. The conviction is not safe and cannot be allowed to stand. I accordingly quash the conviction and order that the Appellant be set at liberty forthwith unless otherwise lawfully held.

Delivered and signed at Naivasha, this 29th day of July, 2016.

In the presence of:-

For the DPP : Miss Waweru

For the Appellant : N/A

Court Assistant : Barasa

Appellant : Present

C. MEOLI

JUDGE