REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 93 OF 2015

BERNARD KIMUYU NGONYO……..……..…APPELLANT

VERSUS

REPUBLIC……..…….....……...……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. G.M. Mutiso SRM in Criminal Case No. 1329 of 2013, delivered on 15th June 2015 at the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant was charged in the original trial Court with the offence of robbery with violence, contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the night of 8th October 2013 at 0010 hrs at Kiongwani village, Kiou location in Mukaa District within Makueni County, the Appellant together with two others while armed with pangas, robbed James Ndolo Mbuvi of cash being Kshs. 10,000/=.

The Appellant was arraigned in the trial court on 9th October 2013 when he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition of Appeal dated and filed in Court on 22nd June 2015. These grounds of appeal are that there was no evidence to support the charges; the evidence was inconsistent, doubtful and contradictory; the conviction was based on hearsay evidence; the case was not proved beyond reasonable doubt; and the trial court did not consider his defence.

The Appellant's learned counsel, Kamende D.C & Company Advocates, filed written submissions dated 3rd June 2016, wherein it was argued that the trial court did not inform itself how the complainant could identify the accused in the darkness, and no explanation was given to prove the same. Further, that the witnesses alleged that they found the Appellant being treated at a clinic at Kiongwani, but no treatment notes were adduced to corroborate the allegations. It was pointed out that crucial witnesses such as Mutiso and Maria Zara of the dispensary where the Appellant was treated were never called as witnesses

In addition, that no weapon used during the attack was produced as evidence, and the weapon which was in possession of the complainant was not analysed to ascertain the DNA component. Reliance was placed on the decision in **Njenga and 10 Others V Republic** (**1992) KLR 1** on identification and recognition. It was submitted in this regard that no identification parade was conducted after the Appellant was arrested to positively identify the culprit.

Cliff Machogu, the learned Prosecution counsel, filed written submissions dated 3rd June 2016 in response to the Appellant's appeal. It was conceded therein that there was no proper identification of the

Appellant. Further, that the complainant did not explain how he identified the Appellant. In addition it was pointed out that crucial witnesses mentioned by PW1 and PW2 were not called to testify, and no treatment records were produced as exhibit to prove that the Appellant was treated at Maria Zara's clinic.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution called two witnesses. PW1 was James Ndolo Mbuvi who testified as to the events of the nights of 7th and 8th when the alleged offence occurred. PW2 was PC Cyrus Karema who testified on the report he received about the robbery.

The two issues raised by the Appellant's grounds of appeal and submissions are firstly, whether there was proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of robbery with violence was based on sufficient evidence.

On the issue of identification, the Prosecution has conceded that there was no identification of the Appellant. I agree with this position. The evidence by PW1 as to the identification of the Appellant was that he was sleeping at home when the Appellant broke into his house accompanied by two others and they demanded for money. PW1 then showed them the jacket with the money, and that the Appellant then gave his accomplices his panga, and they went outside leaving the Appellant counting the money. PW1 and one Mutiso who was in the same house then attacked the Appellant since he was no longer armed, and cut him on the arm and head. The Appellant together with his accomplices then ran away, and PW1 reported the matter at Salama Police station.

PW1 further testified that he later identified the Appellant when he received information that the Appellant was being treated at a private clinic in Kiongwani. He said that the Appellant was his village mate and that he had seen him earlier on the day of the attack. PW2 on his part testified that he got a report from the complainant that the Appellant had been treated at Maria Zara' dispensary at Kiongwani market. They went to the clinic and found the Appellant being treated for cut wounds on the head. They then arrested him and took him to the police station.

I*n **Maitanyi vs Republic** , (1986) KLR 196* **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

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

In the circumstances of the present appeal , PW1 did not provide any evidence as to the prevailing conditions at the time of the robbery that made it possible to identify the Appellant, save for stating that he had seen the Appellant earlier in the day. PW1 testified that they were sleeping at night when they were attacked, but did not provide any evidence whether there was light, and how he was able to know that it was the Appellant that he cut. Lastly, no evidence of any description of the attackers was provided by either PW1 and PW2.

From the evidence adduced, it would appears that the identification by PW1 was made after the robbery, by virtue of information received of a person receiving treatment for cuts similar to those inflicted by PW1. It is thus my finding that it was not was safe to convict the Appellant on the basis of PW1's evidence of identification, as the said identification was not proper nor positive.

This finding is sufficient to dispose of this appeal, as the result is that there is no evidence that places the Appellant at the scene of the crime, and it is therefore not necessary to proceed with an analysis of whether the ingredients of the offence of robbery with violence were met as against the Appellant.

I accordingly quash the conviction of the Appellant for the offence of robbery with violence, contrary to section 296(2) of the Penal Code. I also set aside the sentence of death imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 3RD DAY OF AUGUST 2016.

P. NYAMWEYA

JUDGE