REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 301 OF 2010

JOHN SAIDINGA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru, Hon. D. K. Mikoyan –Senior Resident Magistrate delivered on the 1st October, 2010 in CMCR Case No. 1972 of 2009)

JUDGMENT

The Appellant **JOHN SAIDINGA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Nakuru Law Courts. The appellant was arraigned before the trial court on 2/4/2009 facing a charge of **ROBBERY WITH VIOLENCE CONTRAY TO SECTION 296(2) PENAL CODE**. The particulars of the charge were that

> ***"On the 20th day of March 2009 at Oloporil in Nakuru District within Rift Valley province robbed ELIZABETH KARIA of Ksh 15,000/- one mobile phone make Nokia 1680c and assorted clothes all valued at Ksh 23,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ELIZABETH KARIA while armed with a knife"***

In addition the appellant faced an alternative charge of **HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE**. The appellant entered a plea of **'Not Guilty'** to both charges and his trial commenced on 23/2/2010. The prosecution led by **CHIEF INSPECTOR LELIA** called a total of four (4) witnesses in support of their case.

The complainant **ELIZABEITH KALYA** testified in this case as **PW2**. She told the court that on 20/3/2009 she was asleep in her home in Narok with her children. Her husband **BENSON KARIA PW1** was away at the time. At about 3.00am the house was broken into. **PW2** recognized the intruder to be the appellant who was her herdsman. He had in his hand a Somali sword. The appellant demanded money **PW2** gave him Ksh 15,000/= which her husband had left with her for home use and her mobile phone make Nokia. Appellant also took clothes belonging to **PW2**. After the appellant left **PW2** waited until morning then raised the alarm. She also informed her husband **PW2** about the incident. The matter was reported to police. Later the appellant was arrested at Rumuruti Market. He was found wearing clothes which **PW2** identified as the clothes which had been stolen from his house. The appellant was then arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case answer and was placed onto his defence. He opted to give a sworn defence in which he categorically denied having robbed the complainant on the night in question.

On 7/10/2010 the learned trial magistrate delivered his judgment in which he convicted the appellant of the charge of Robbery with Violence and thereafter sentenced him to death. The appellant who was aggrieved by both his conviction and sentence filed this present appeal. The appellant who was not represented during the hearing of his appeal opted to rely upon his written submissions which had been duly filed in court. **MS NYAKIRA** learned State Counsel made oral submissions opposing the appeal and urging the court to uphold both the conviction and sentence imposed by the lower court.

Being a court of first appeal we are under a duty to re-evaluate and re-examine the prosecution evidence and draw my own conclusions thereon **(see AJODE Vs REPUBLIC 2002 KLR)**. In the case of **MWANGI Vs REPUBLIC [2004] 2 KLR** the Court of Appeal held that

> ***"1. An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"***

In this case **PW2** told the court that on the night of 20/3/2009 her home was broken into at 3.00am as she was sleeping therein with her children. **PW2** told the court that police visited the scene and confirmed that a break in had occurred. Strangely enough no officer who visited the scene testified in court to confirm that a break in had occurred. Neither **PW3 PC MILTON LEKLILA** nor **PW4 PC ELKANA KIBET** told the court that they visited the scene. No photographs of a broken door or window were produced in court. It is curious how police would purport to investigate this break in and robbery without bothering to visit the scene. However this is not in our view a critical omission. The complainant would have no reason to lie about being robbed. We accept her evidence and find that indeed the robbery did occur as she stated.

The key question here is that of identification. Has there been a proper identification of the appellant as the man who robbed **PW2**. In her evidence **PW2** stated that the intruder spoke with her demanding money and ordering her about. She was able to recognize the voice as that of her herdsman. The appellant does not deny that he was an employee of **PW2**. This was a man she knew well, and whom she saw and spoke to on a regular basis each day. His voice was no doubt very familiar to **PW2** and we have no doubt that she would be well able to identify that voice. In her testimony **PW2** said;

> ***"It was dark when he woke me up asking for money in the house. Of course I heard his voice and since I stay with him I recognized his voice"***

From the description given by **PW2** the appellant was with her in an enclosed space *ie* her bedroom. She spent ample time with him and heard his voice clearly. Under cross-examination **PW2** remains unshaken and states

> ***"Everyone has a voice but one is very different from each other. I knew my herdsmen even by voice since they lived with me"***

Aside from this voice **PW2** told the court that she saw the appellant. Although the incident occurred at night – 3.00am the witness stated that the appellant had with him a torch. It was this torch which he used to light up various parts of the room in order to identify the items he wished to steal. At page 20 line 19 **PW2** says

> ***"Accused was using a torch that night and it was reflecting high light"***

In other words **PW2** testified that the torch gave out a bright light which enabled her to see the appellant.

We are mindful of the fact that this is a case where there is only one identifying witness. As such care must be taken in accepting her evidence on identification and any possibility of mistaken identity must be ruled out. In the case of **MAITANYI Vs REPUBLIC [1986]** it was held

> ***"Although it is trite law that a fact may be proved by the testimony of a single witness, this 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 following a correct identification were difficult"***

In this case though the incident occurred at night we find that **PW2** was able to positively identify the appellant by way of voice recognition and by visual recognition. The appellant was a man she knew very well and she spent time with him in an enclosed room.

Although we did not see or hear **PW2** testify we find that she gave clear, consistent and cogent evidence and remained unshaken under cross-examination by the appellant. It is pertinent that immediately after the robbery **PW2** informed her husband that it was their herdsman who robbed her. At no time did she waver in her identification of the appellant. We find there exists no room for a mistaken identity.

PW1 told the court that when the appellant was arrested he was found wearing some of the clothes of **PW1** which had been stolen during the robbery. Both **PW1** and **PW2** identify the stolen clothes in court. Although there was no peculiar mark on the clothes and shoes the appellant does not deny that he was found wearing those clothes nor does he deny that the clothes and shoes belonged to **PW1**. By way of explanation the appellant states that he was involved in a love affair with **PW2** and it was she who gave him her husband clothes to wear. We find this defence to be a mere fabrication and an afterthought given that the appellant never put these issues to **PW2** when he was given an opportunity to cross-examine her. Had any of these allegations been the truth then we have no doubt that the appellant would have raised them at the earliest opportunity while cross-examining **PW2**.

Further the appellant was found in possession of the complainant's Nokia mobile phone. The complainant was able to positively identify her mobile phone by the mark of her name **'Eliza'** on the phone. The appellant claims it was **PW2** who herself gave him her mobile phone. Again we dismiss this defence as an afterthought as he did not put this to **PW2** while cross-examining her.

From the evidence we find that the appellant was found in possession of property stolen from **PW2** barely five (5) days after the robbery. The doctrine of **'recent possession'** would squarely apply.

In the case of **ISAAC NGANGA KAHIGA alias PETER NGANGA KAHIGA Vs REPUBLIC Crim Appeal No 272 of 2005 (unreported)** the Court of Appeal whilst discussing the doctrine of recent possession held as follows –

> "***It is trite law that before a court of law can rely on the doctrine of recent possession in a criminal case the possession must be positively proved. In other words there must be positive proof, first that the property was found with the suspect, and, secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant".***

In this case the appellant himself concedes that the clothes and mobile phone were found in his possession. Both the complainant and her husband **PW1** have positively identified the property as theirs. The property had recently (5 days prior) been stolen from the complainant. All the ingredients for the doctrine of recent possession have been satisfied in this case.

On the whole we find the evidence to be overwhelming. It has been proved beyond reasonable doubt that it was the appellant who broke into the house of **PW2** and robbed her all the while armed with a sword. The charge of Robbery with Violence was in my view satisfactorily proved. The conviction of the

appellant was sound and we do confirm the same. Likewise the death sentence imposed upon the applicant was lawful and we do uphold that sentence. This appeal therefore fails and is dismissed in its entirety.

Dated at Nakuru this 30th day of September, 2016.

……. **…….**

M. Odero **A. Ndung'u**

Judge **Judge**