REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 56 OF 2015

JACKSON KIBOR CHERONO …… APELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable E. TANUI in Eldoret Criminal Case No. 3089 of 2012 dated 23rd April, 2015)

JUDGMENT

1. In a substituted charge sheet dated 21st November 2013, the appellant *Jackson Kibor* was charged jointly with two others namely *Felix Kiprotich* and *Andrew Kiplagat* in three counts with the offence of robbery with violence. They were also charged in count 4 and count 5 with the offences of being in possession of ammunitions and a firearm without a firearm's certificate contrary to *Section 4(2) (A)* as read with *Section 4(3) (A)* of the Firearms Act.

2. After a full trial, the appellant's co-accused were acquitted of the charges in all the five counts for lack of sufficient evidence. The appellant was also acquitted in count 1, count 3, count 4 and count 5 but was convicted in count 2 with the offence of robbery with violence.

3. The particulars of the offence in count two allege that on the 1st day of July 2012 at Trail Blazers Pub in Eldoret Township within Uasin Gishu County, while armed with dangerous weapons namely an AK 47 riffle and rungus, the appellant jointly with his co-accused violently robbed *Tom Shitero* of one mobile phone make Nokia valued at Kshs.4,000 and Kshs.1,750 all valued at Kshs.5,750.

4. Upon his conviction, the appellant was sentenced to death. He was dissatisfied with his conviction and sentence hence this appeal. He initially filed the appeal in person but when he subsequently engaged legal counsel, his advocates *Ms. Marube and Company Advocates*, filed a supplementary Petition of appeal dated 5th May, 2016

5. In the supplementary petition of appeal, the appellant raised three grounds as follows;

> **1.** ***That the learned trial magistrate erred in law and in fact in not finding that the circumstances of identification of the Appellant were not conducive and did not meet the required legal standard.***
>
> ***2. That the learned trial magistrate erred in law and in fact in not evaluating the whole evidence including the Appellant's defence as it was incumbent upon her.***

3. That the learned trial magistrate erred in law and in fact when she failed to resolve material contradictions in favour of the Appellant.

6. At the hearing, the appellant was represented by learned counsel *Mr. Marube* while learned prosecuting counsel *Ms Mokua* appeared for the state. In his submissions, *Mr. Marube* urged the court to find that the appellant was not positively identified as a participant in the robbery in respect of which he was convicted as the circumstances then prevailing were not conducive to a positive identification of the assailants; that the appellant's alleged identification by PW2 and PW3 amounted to dock identification which was worthless as there was no evidence that an identification parade was conducted in the course of investigations. Counsel further submitted that the learned trial magistrate erred as she convicted the appellant without considering his defence. He urged the court to find that the appellant's conviction was unsafe and allow the appeal.

7. The appeal is not contested by the state. Learned prosecuting counsel *Ms. Mokua* conceded to the appeal on grounds that the identification evidence adduced by the prosecution was not sufficient to positively identify the appellant as a participant in the robbery; that there was no evidence to show the circumstances in which the appellant was arrested.

8. I wish to start by reminding myself of the duty of the first appellate court which is to revisit the evidence adduced before the trial court and make my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses.

See: ***Mwangi V Republic (2004)KLR 28; Soki V Republic (2004) 2 KLR 21.***

9. I have considered the evidence on record, the grounds of appeal and the submissions made by both parties. I have also read the judgment of the learned trial magistrate and the authorities cited by learned counsel *Mr. Marube.*

10. From the judgment of the learned trial magistrate, it is clear that the appellant's conviction was mainly premised on the identification evidence adduced against him by PW2 and PW3. Both witnesses claimed to have seen and identified him at the scene of the robbery and later at an identification parade.

11. It is now settled law that where a conviction is based primarily on identification evidence, for that conviction to be safe, the evidence must be watertight and must not leave any room for any possibility of mistaken identity. In ***Wamunga V Republic (1989) KLR 424***, the Court of Appeal buttressed this point when it held as follows;

"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction…"

12. In ***Kiarie V Republic (1984) KLR 739***, the Court of Appeal appreciated that it was possible for witnesses to make honest mistakes in the visual identification of suspects. The court expressed itself as follows;

"It is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction".

13. The question that arises for determination in this appeal is whether the appellant was positively identified as one of the robbers who stormed into the pub, injured PW2 and PW3 before robbing PW2 and disappearing into the night. These two witnesses claimed that they saw and identified the appellant as the robber who hit them on the head during the robbery. PW2 claimed that he was hit when he was pushed to the bar while PW3 claimed that the appellant walked into the butchery and hit him. They allegedly saw him through lights in the bar and butchery.

14. When convicting the appellant, the learned trial magistrate did not interrogate the circumstances prevailing at the time of the robbery in order to establish whether they were conducive to a reliable and correct identification of the robbers. She merely relied on the witnesses claim that they had seen and identified the appellant through light in the bar and in the butchery. The trial court did not seek to find out the source of the said light, its intensity or the time the witnesses had to see and identify their assailants.

15. On my reappraisal of the evidence on record, I find that the circumstances prevailing in this case were not conducive to a positive and reliable identification of the appellant. The robbery occurred at night and PW2 and PW3 do not appear to have had sufficient time to properly see and identify the robber who assaulted them. They did not know the appellant before and this was not therefore a case of recognition which is always more reliable. It was a case of identification of a mere stranger in difficult circumstances. The circumstances in which the appellant was allegedly identified cannot be said to have been free from the possibility of error.

16. It is important to note that the appellant was not arrested at the scene and no iota of evidence was adduced to show when, how or why he was arrested. The arresting officer(s) were not called as witnesses to tell the court how the appellant was linked to the offence to justify his arrest given that from the evidence, the arresting officers had not been given a description of the suspects. According to PW2 and PW3, they found the appellant already in the police cells.

17. It is noteworthy that one of the reasons the learned trial magistrate relied on in holding that the appellant was properly identified was her erroneous finding that he was also identified by the two witnesses at an identification parade. This finding was not based on any evidence. The prosecution did not adduce any evidence to prove that an identification parade was ever conducted in this case.

18. For all the foregoing reasons, I am unable to agree with the learned trial magistrate that the appellant was positively identified as the person who robbed PW2. I find that the trial court failed to thoroughly interrogate the evidence presented before it and thereby arrived at the erroneous conclusion that the charges had been proved against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant's conviction was not safe. It cannot be allowed to stand. The appeal is thus merited and it is hereby allowed.

The appellant's conviction is accordingly quashed and the sentence of death set aside.

He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 16th day of November, 2016

In the presence of:

Appellant

Mr. Marube for the appellant

Ms Oduor for the state

Naomi Chonde court clerk