**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 137 OF 2013**

**PERIS MUTHONI MBALUK……………….......……..…...APPELLANT**

**VERSUS**

**REPUBLIC………………………………………………RESPONDENT**

*(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 6 of 2013, Hon Joan Wambilyanga, SRM) delivered on 1st November, 2013)*

**JUDGMENT**

The appellant was charged and convicted of the offence of robbery with violence contrary to section **295** as read with **section 296 (2)** of the **Penal Code, cap 63**. According to the particulars of the offence, on the 24th day of November, 2012 at unknown place at Chaka trading centre in Nyeri county within the Republic of Kenya, jointly with others not before court, while armed with dangerous weapons namely knives and a piece of wood, the appellant robbed Musa Muthee Maina of his TV set (make sonex) valued at Kshs 9,400/=,two-subwoofers valued at Kshs 7,200/=, amplifier valued at Kshs 8,050/=, LG DVD valued at Kshs 3,300/=, thermos flask valued at Kshs 2,100/=, a wall clock make quartz valued at Kshs 600/=, two techno mobile phones valued at 15,900/= and other hotel items valued at Kshs 50,000/= and at the time of such robbery used actual violence to the said Musa Muthee Maina.

She was sentenced to death and now she has appealed to this court against both the conviction and sentence on the grounds which I understand to be as follows: -

1. The learned magistrate erred in law and in fact in failing to observe the contradiction between the complainant's statement to the police where he alleged that he was forced to send money from his M-pesa account by his cousin and his evidence in court according to which he stated that it was the appellant who forced him to send money to one Charity;

2. The learned magistrate erred in law and in fact in failing to observe the contradiction between the evidence of the complainant and that of the doctor on the number of teeth which the appellant claimed to have lost and the reasons for such a loss;

3. The learned magistrate erred in law and in fact in failing to observe the complainant's contradictory evidence on material aspects of his evidence.

In order to appreciate the case against the appellant in the trial court, it is necessary to look at the evidence that was proffered in that court. As the first appellate court, this exercise is mandatory; this Court is enjoined to evaluate the evidence taken at the trial afresh and come to its own conclusions. However, unlike in the magistrates' court which had the advantage of seeing and hearing the witnesses,

this Court can only make those factual determinations based on the inanimate trial record. Nevertheless, it is a disadvantage that will not restrict the Court in exercise of its appellate jurisdiction, first, to evaluate the evidence afresh because it is the appellant's entitlement to such fresh evaluation of the evidence, and second, this Court is not bound by the factual conclusions arrived at by the magistrates' court despite the latter's advantage of active interaction with the witnesses. The legal basis for the need for fresh analysis of the evidence by the appellate court despite its limitations is well captured in **Okeno versus Republic (1972) EA 32** where the Court of Appeal for East Africa had this to say:

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of a first appellate court merely to scrutinize the evidence to see if 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 magistrates' findings can 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 page 36 of the decision thereof)***

The complainant testified that on 4th November, 2012 at about 1 AM he was in one of his restaurants when someone called him out; he responded and opened the door. Immediately thereafter five people, two of whom were women while the rest were men, gained entry into the restaurant. They beat him up as a result of which he was injured, losing his teeth in the process.

While he was down on his sofa, one of the attackers placed a knife on his neck and demanded to be given his M-pesa pin number. He gave it out and as a result the robbers withdrew the sum of Kshs 50,000/= from his account. He established that the money had been transferred to one Charity Wangechi who, according to his testimony, usually visited the appellant in prison.

The robbers carted away his property which included electronic items; they also stole from him the sum of Kshs 6,000/= cash.

It was his evidence that the appellant was one of the members of the gang that robbed him on the material night and that he knew her because she had been in his restaurant earlier to take tea. He recognised her because she had also marks on the face. He insisted in cross examination that indeed it is the appellant who held the knife at his neck. He also testified that the appellant, must have been one of the robbers because some of the complainant's stolen items, in particular a wall clock and an extension cable, were recovered from the appellant's house.

Somehow, the complainant got to establish that the beneficiary of the money from his M-pesa account lived with the appellant; it is not clear how he came about this information but it is this information that led him and apparently, the police officers to the appellant's house. They went there looking for Charity Wangechi.

Concerning the complainant's injuries, evidence was led by a doctor to the effect that on 15th December, 2012, the complainant went for treatment at Nyeri provincial general hospital. He had sustained injuries on the head, the neck and the mouth. One of his teeth was found lose and was extracted. As of that date, the approximate age of the complainant's injuries was said to be five days' old.

Although the robbery was committed on 4th November, 2012, the investigations officer testified that it was only on 31st December, 2012 that he was directed by the provincial criminal investigation officer to investigate the complainant's complaint; according to his evidence, the complaint had been reported on 24th November, 2012. The information he got from the complainant was that he had been attacked by four people two of whom were women while the other two were men. That he disclosed his M-pesa pin number to one of the women after she threatened him with a sword. The money was transferred to the account of Charity Wangechi.

On 3rd January, 2013, the investigation officer got information from the complainant that one of the two women who attacked him resided at Kiandu in Nyeri township. Armed with this information, he laid an ambush together with his colleagues and arrested the appellant in her house. They recovered a wall clock and an extension cable which had been stolen from the complainant's house. The complainant identified the appellant at the scene.

The appellant denied the offence and in her unsworn statement she said that on 2nd January, 2012 at around 3 PM she was on her way home when a motor vehicle approached from behind; a man disembarked and called out Charity's name. She told him that she was not Charity though she had a friend by that name. She was arrested and taken to the police station where the police asked her to tell them where Charity was. The police asked her to sign some documents before she was released on a free bond.

Sometimes later, apparently on a different day, while she was at the same police station, both Charity and the complainant came to the station and proceeded to the office of investigations officer. She was called in the office and asked to identify her; she informed the police that indeed she was her friend, Charity Wangechi, whom she had referred to earlier. She was later charged with the offence for which she was convicted and sentenced. It was her case that she was framed by the police.

Ordinarily the first question that I ought to consider is whether, from the available evidence, the offence of robbery with violence was committed. If the answer to this question is in the affirmative, I would then move to the next question which is whether the appellant was the perpetrator of this offence. I am, however, inclined to consider this second question first because if I come to the conclusion that the appellant had nothing to do with this crime, the question whether the crime was committed in the first place becomes irrelevant. It would simply mean that if the crime was committed at all then the wrong person was charged.

The central question in this regard, and which in my humble view ought to have been given due attention in the trial against the appellant is that of her identification. There are several facets to it; first, there is the question of the conditions or circumstances under which the appellant is alleged to have been identified; second, there is the question whether the appellant's was a case of identification or recognition; third, being a single identification witness, the necessary caution that court ought to have taken into account in admitting the complainant's evidence; and finally, it was necessary for the court to consider whether there was any link between the items recovered from the appellant's house and those allegedly robbed from the complainant's hotel.

These questions are largely intertwined but the resolution of the first one would obviously resolve the second and the third questions; if it is found that the conditions in which the appellant is alleged to have been identified were unfavourable for a proper identification, then the second question of whether she was identified or recognised becomes less significant. For the same reason, it wouldn't matter whether the appellant was identified by single witness or a string of them. The final question has everything to do with the ownership of the items allegedly recovered from the appellant's house and therefore the logical question that follows is whether this aspect of ownership was established beyond reasonable doubt as for the learned magistrate to come to the conclusion that these items belonged to the complainant.

In her judgement, the learned magistrate accepted the evidence of the complainant that he recognised the appellant as one of his attackers because she had been in his restaurant earlier. She found this evidence to have been corroborated by the evidence of recovery of the complainant's property in the appellant's house. With this evidence, the learned magistrate came to the conclusion that the appellant was properly identified. With due respect to the learned magistrate, I hold the view that had she interrogated the evidence of these two witnesses further, she would certainly have come to a different conclusion.

There is yet one critical omission from the analysis of the evidence by the learned magistrate before she came to the conclusion that the appellant was recognised; no evidence whatsoever was led as to whether the conditions for a proper identification were favourable. When the evidence of identification forms the basis of a conviction, it is virtually impossible to talk about a proper identification without any reference at all to conditions for such identification.

According to the evidence of the complainant, he was attacked at 1 am on the material day; granted, he may have been attacked in the wee hours of the day, however, the day must still have been engulfed in darkness at such hours. Suffice it to say, regardless of the time of the attack, there was no evidence that there was light sufficient enough for the complainant to recognise the appellant as alleged.

The Court of Appeal in O**geto versus Republic (2004) KLR 19** acknowledged that a fact can be proved by a single identification witness but it cautioned that such evidence must be admitted with care where circumstances of identification are found to be difficult; the court said: -

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

This point was emphasised in **Wamunga versus Republic (1989) KLR 424 where** the same Court held at page 426 that: -

> ***"…it is trite law that where the only evidence against a defendant is evidence 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 possibility of error before it can safely make it the basis of a conviction." (see page 426)***

That the evidence of identification of the appellant was from a single witness is not in doubt; it follows that that evidence ought to have been tested with the greatest care. This, in my humble view was not done, because the prosecution did not prove the nature of the conditions under which the appellant was identified and, more importantly, it did not prove that such conditions were favourable for a positive identification and free from possibility of error; in the absence of this evidence, I honestly cannot see how the subordinate court could have come to the conclusion that the appellant was positively identified.

Again, if I understand the evidence of the complainant correctly, he and the investigations officer set out to look for Charity Wangechi when they literally stumbled upon the appellant. The investigations officer was categorical that the complainant identified the appellant at the latter's house yet there was no evidence that he had given the description of the appellant to the police before they arrested her. The evidence that he could pick out the complainant because she had some particular marks on her face was of no value if such information had not been given to the police beforehand; it is possible that he could only have seen those special features on the appellant's face for the first time when they accosted the appellant in her house.

As noted, the learned magistrate also linked the appellant to the crime perpetrated against the complainant because of the recoveries that are alleged to have been made in the appellant's house, in particular the wall clock and an extension cable. This evidence could not sustain a conviction for two simple reasons; first, it was not proved beyond reasonable doubt that any of these items belonged to the complainant; no receipt or any other form evidence was produced to demonstrate that the complainant was the owner of this property. Neither was it proved that the property bore some special marks or identification features that could only be associated with the complainant.

Secondly, the alleged extension cable is not referred to anywhere in the particulars of the offence as one of the items that were stolen. The appellant could not possibly have been convicted on the basis of evidence that was at variance with the particulars of the offence.

In any event, considering that the kind of wall clock which was allegedly recovered from the appellant's house together with the extension cable are common items that are likely to be found in any household it was mandatory for the prosecution to prove beyond reasonable doubt that these particular ones belonged to the complainant. Without such a proof, it could not be said conclusively that the appellant must have been one of the people who robbed the complainant, merely by recovery of these items.

It must also be noted that there was a span of time between the date of robbery and the date when these items were recovered from the appellant's house. The robbery is said to have occurred on 4th November, 2012 but it was not until 3rd January, 2013 that these items were allegedly recovered. For some unexplained reason, the report to the police was made on 24th November, 2012 and that it was not until the 31st December, 2012 that the investigations officer was directed to commence the investigations. Be that as it may, I doubt the prosecution case could find cover under the doctrine of recent possession if one has to consider the rate at which such items exchange hands.

I am satisfied, for the reasons I have stated, the appellant's conviction was not safe. The case against her was not proved beyond reasonable doubt and she ought to have been acquitted. I will allow her appeal, quash the conviction and set aside the sentence against her. The appellant is set at liberty unless she is lawfully held.

**Signed, dated and delivered in open court this 9th day of December, 2016**

Ngaah Jairus

**JUDGE**