REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.296 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. D.A. Okundi, P.M. delivered on 8th November 2011 in Kiambu CM. CR. Case No.848 of 2010)

MICHAEL GITHAIGA NDERITU……..……..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Michael Githaiga Nderitu was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 16th May 2010 at Kahawa West in Nairobi County, the Appellant robbed Monica Wanjiku of a mobile phone valued at Kshs.3,500/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said M W (hereinafter referred to as the complainant). The Appellant was further charged with **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully assaulted the complainant thereby occasioning her actual bodily harm. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on the charge of **robbery with violence.** He was sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the same.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification of a single identifying witness made in circumstance that was not conducive to positive identification. He faulted the trial magistrate for failing to take into account the fact that in the circumstances of his arrest raised doubt as to his guilt as the perpetrator of the offence. He took issue with the fact that the trial magistrate had not taken into consideration his defence before arriving at the verdict to convict him. He was finally aggrieved that he had been convicted on the basis of evidence that had not established his guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his

appeal. He made oral submission further urging the court to allow his appeal. Ms. Aluda for the State conceded to the appeal. She submitted that the evidence of identification adduced by the prosecution witnesses was not watertight as to exclude the possibility that the complainant may have been attacked by a person other than the Appellant. She did not therefore support the conviction of the Appellant.

From the facts of this appeal, it was apparent that the Appellant was convicted solely on the evidence of identification by the complainant. The complainant testified that on 16th May 2010 at about 5.30 a.m. she went to Kahawa West from her residence within Kamiti Prison to purchase milk. After purchasing the milk, on her way back home, she saw a man following her. This was about 6.00 a.m. She was scared. The man walked ahead of her, turned and attacked her. The man held her and attempted to remove her clothes. She resisted. A struggle ensued. She was beaten by the man. She sustained scratch injuries on her face. She was hit on the lower abdomen. She bled for fifteen (15) days. In the course of the struggle, she heard someone say ***"shika huyo".*** The man left her and took flight. He robbed her of her mobile phone and Kshs.300/- which was in a paper bag. As he was running, the man dropped the paper bag containing the money. The complainant went home and informed her husband. Her husband made a report to the police at Kiamumbi Police Station. She was taken to hospital where she was treated and discharged. The complainant testified that she was able to identify her assailant although she had not met him before. It was clear from her evidence that she did not give the description of her assailant in the first report that she made to the police. She did not even describe the clothes that the assailant wore.

What is interesting in this case is that instead of the police taking the lead in investigating the case, it was left to a prison officer to look for the assailant. PW2 Charles Ooko, a prison warden testified that the complainant gave her the description of the person who assaulted and robbed her. This person was said to have been seen at Arsenal carwash in Kahawa West. On 23rd May 2010, PW2 went to the said carwash and saw someone who looked suspicious. He arrested him and escorted him to Kahawa West AP camp. He called the complainant to identify him. The complainant said that the person was not the one who robbed her. As they were walking with the complainant to Kamiti Prison, she saw the Appellant and pointed at him saying that he was the one. He was arrested and taken to Kiamumbi Police Station.

The complainant was examined by Dr. Zephaniah Kamau on 25th May 2010. He noted that the complainant had sustained scratch mark injuries on her right cheek, nose and left cheek which had a darkening skin around the left eye. She had a haematoma on the lower left side of the abdomen. The injuries were caused by a blunt object. She was treated at Dolphin Health Clinic. The degree of injury was assessed as harm. The P3 form was produced into evidence. The case was investigated by PW4 Corporal Daniel Mwita. He testified that on 16th May 2010 at about 8.30 a.m., the complainant went to Kiamumbi Police Station and reported the assault and robbery. She told PW4 that she would be able to identify the person who assaulted her by facial appearance. She however did not describe the physical features of the person who assaulted her to the police. On 23rd May 2010, the Appellant was taken to the police station by PW2. Upon concluding his investigation, PW4 charged the Appellant with the present offence.

When the Appellant was put on his defence, he denied either assaulting or robbing the complainant. He narrated the circumstances of his arrest on 23rd May 2010. He told the court that he was arrested while he was at his place of work at Kahawa West, escorted to Kamiti Prison where he was beaten before he was taken to Kiamumbi Police Station. He was of the view that the charges brought against him were fabricated. He stated that he had not met the complainant before the incident. He pleaded his innocence of the charges.

This court, as the first appellate court, is required to look afresh at the evidence adduced before the trial court before arriving at its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore must give due allowance in that regard (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the main issue for determination is whether the prosecution adduced sufficient evidence of identification to secure the conviction of the Appellant on the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

We have carefully re-evaluated the evidence adduced before the trial court in light of the submission made by the parties to this appeal. As stated earlier in this judgment, it was clear that the prosecution relied on the identifying evidence of a single witness to support the charge against the Appellant. There are certain conditions that must be considered before a court convicts an accused person on the basis of the evidence of a single identifying witness. In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200** the Court of Appeal held that:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg [1953] 20 EACA 166 followed in Roria vs Rep [1967] EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> > ***"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 present appeal, it was clear that the trial court did not apply its mind to the caution expressed by the Court of Appeal before it convicted the Appellant on the basis of the evidence of the single identifying witness. As stated earlier in this judgment, the complainant did not give the physical description of her assailant in the first report that she made to the police. She only said that she would be able to identify the person if she saw him again. She had not met the Appellant prior to the assault and robbery incident.

From the evidence of PW2 and PW4, it was evident that the complainant gave different information regarding the identity of her attacker to PW2 and PW4. The only conclusion that this court can reach regarding this state of affairs is that the complainant was not certain as to the identity of the person who attacked her. In the hectic circumstances of the assault and robbery, it was possible that the complainant may have been mistaken that she had identified the Appellant as the person who attacked her. Her testimony was devoid of evidence relating to the light conditions that existed at the time. She was attacked at about 6.00 a.m. It was not clear from her evidence if there was sufficient light which enabled her to be certain that she had identified the Appellant as her attacker.

In its judgment, the trial court did not warn itself of the danger of convicting the Appellant based solely on the evidence of a single identifying witness. There was no other evidence which was adduced by the prosecution to connect the Appellant to the crime. The defence by the Appellant to the effect that he was a victim of mistaken identity may well be the case.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses, we are not satisfied that indeed the complainant identified the Appellant as her assailant. Ms. Aluda for the State correctly in our view conceded to the appeal. The conviction of the Appellant on the evidence on record cannot be sustained. The appeal is allowed. The Appellant's conviction is hereby quashed. He is acquitted of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JUNE 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE