REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 37 OF 2014

R.V.P. WENDOH AND J.A.MAKAU JJ

GILBERT MURIITHI KABURU ……. ……APPELLANT

-V E R S U S –

REPUBLIC …… ……..RESPONDENT

(From the original conviction and sentence in criminal case no. 1797 of 2004 of the Principal Magistrate's court at Chuka – A.N. Kimani P.M.)

JUDGEMENT

1. The Appellent was charged with an offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence are that on the night of 2nd day of August 2nd day of August 2004 at Karandini village, Thuita sub location, Magumoni location in Meru South district within Eastern province, jointly with others not before court while armed with dangerous weapon namely axes, rungus and torches robbed Severino Ireri his cash Kshs. 6,000/- and at or immediately before or immediately after the time of such robbery wounded the said Severino Ireri.

2. That after full trial the appellant was convicted and sentenced to death. Being aggrieved by both the conviction and sentence he preferred this appeal setting down the following grounds of appeal.

1. That trial magistrate erred in law by not making a finding that the provisions of article 49 (b) (f) (I) (ii) of the Constitution of Kenya were flouted.

2. That the trial magistrate erred both in law by flouting the provisions of section 50 (2) (m) of criminal procedure code.

3. That the trial magistrate erred both in law and facts by failing to make a finding that the alleged identification and or recognition weren't free from possibility of error.

4. That the trial magistrate erred both in law and facts by failing to make a finding that he was charged upon defective charge sheet.

5. That the trial magistrate erred both in law and facts by failing to note that the presentationof the exhibiteditems fell short of the required standard in law.

6. That the trial magistrate erred both in law and facts by failing to observe that the prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached.

3. The appellant appeared in person. The state was represented by Mr. Kariuki Mugo, learned state counsel.

4. The appellant in support of his appeal relied on written submissions which he produced before the court. The appellant's appeal in his written submissions is briefly based on the grounds that the circumstances were not favourable for positive, reliable and correct recognition and that the recovered cap was not positively proved to be his cap. That the evidence of PW1 was not corroborated by PW2 and PW3 and further that all vital witnesses were not availed by the prosecution.

5. Mr. Kariuki Mugo opposed the appeal. He submitted that under Article 49 of the Constitution of Kenya 2010 it is true that the appellant was arrested on 24th September 2004 but arraigned in court on 14th October 2004. He submitted that being a constitutional issue the appellant's redressis supposed to being another form and not in a criminal court. He urged that the repealed constitution allowed detention for a period not exceeding 14 days but the appellant was detained for 20 days. In support of that position he relied on thecase of **JULIUS KAMAU MBUGUA V REPUBLIC C.A.CR.A. NO. 50 OF 2008 (Nairobi).**On appellants ground of appeal Mr. Kariuki Mugo learned state counsel submitted that such Article as quoted by the appellant do not exist.

6. On the recognition of the appellant Mr.Kariuki Mugo, learned state counsel submitted that there was proper identification of the appellant by PW1, PW2 and PW3. Mr. Kariuki Mugo referred to the case of **Peter Muimi Nzana and another v Republic .C.A. Cr. A No. 8 of 2014** where the court of appeal stated:-

"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personalknowledge of the assailant in some form or other."

7. Mr. Kariuki Mugo learned state counsel further relied on the case of **James ChegeWanja v Republic C.A. No. 323 of 2011** where the Court of Appeal addressed itself as follows:

"On voice recognition, in Karani vs. Republic,(1985)KLR 290, this court held at page 293 . . .identificationbyvoice nearly always amounts to identification by recognition. Yet here as in any other cases care has tobe taken toensure that the voice was that of the appellant, than the complainant was familiar with the voice and that he recognized it and there wereconditions in existence favouring safe identification."

8. On the drawing of the charge Mr.Kariuki Mugo learned state counsel submitted that the charge is properly drawn and is not defective. He added the production of the exhibit was procedural, and that the appellant did not object to the production of the P3 form. He added that the evidence of PW1 and that of the other witnesses were consistent as they corroborated one another.

9. The appellant in response submitted that the charge was inconsistent in respect of the amount stolen with the evidence. That the investigating officer was not called and that he was held in police cells for 20 days pending investigation and being arraigned in court.

10. We are the first appellate court and as first appellate we have subjected the evidence adduced before the trial court to fresh evaluation and analysis andhave come to our own conclusion while bearing in mind our limitation since we neither saw or heard the witnesses and have given due allowance. We are in this regard guided by the case of **Odhiambo v Republic (2005) KLR Page 565** in which Court of Appeal stated:-

"On a first appeal, the court is mandated to look at the evidence added before the trial

afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demenour."

11. The prosecution case is that on 1st August 2014 at 2.00 a.m. thugs attacked PW1 while asleep at his place of business when they broke into his premises with a big stone. They entered and hit the complainant on the head.He fell down and heard the voice of the appellant asking him to produce money since he knew the complainant had money; that the complainant had given him change during the day and he had leased a hotel from the complainant next to his shop; that they were doing business together at that centre; that the attackers took away 2 suits,one which had Kshs. 6300/-; that the complainant screamed for help and people came to his aid ;the attackers ran away leaving behind the complainants suit after removing the money. A cap was recovered; that the complainant identified the cap as belonging to the appellant,which the appellant used to wear; that an axe and arrow were recovered at the scene,the complainant was taken to Chuka General Hospital, admitted at sister's hospital, operated in Embu hospital and taken to Nairobi where an operation was done;that PW1 was able to identify the voice of the appellant and he told the police he was able to recognize the voice as that of the appellant.

12. PW2 testified that she heard the doorof the complainant being hit as her house was next to that of the complainant. She tried to open her door but in vain. She came out through the window and found outside the complainant's house an axe and cap. She identified the cap as one belonging to Murithi, appellant as he was running a hotel next to her hotel. PW2 used to see the appellant wearing the cap. She testified that she told the police about it.

13. PW3 testified that at 2.00 a.m. she heard a bang on a door of the complainant. She tried to open her door but could not open. She went out through the window and proceeded to complainants' place. She found a cap at the door which she recognized as that of a hotel operator nearby, the appellant; that it was a navy blue cap.

14. PW4 No. 61838 IP. CHARLES NYABAYO testified that on 2nd August 2004 at 2.30 a.m. he was awakened up over a report by Assistant Chief Kirache over a robbery. That he took Cpl. Kio and proceeded to the scene of robbery. That they found a door broken by a stone and recovered a cap, axe and arrow. That they found the complainant at the scene who had been injured. That the appellant was arrested over the attack. PW4 produced axe, cap and arrow as exhibit 1,2 and 3 and P3 form as exhibit 4.

15. The appellant gave unsworn testimony. He testified that on 31.7.2004 he was at his place of work and he closed his business in the evening and slept.That the next day he proceeded to Runyejes to buy meat and returned at 10.00 a.m.; that he worked till close of business and went to sleep; that he did not know of any incident and the next day he continued working upto the time when he had to vacate the premises when the landlord caused his arrest because of the arrears he owed in rent.

16. The evidence against the appellant is that of voice identification by a single witness, PW1, and the identification of the appellant's cap by PW1, PW2 and PW3.

17. We have very carefully considered the evidence of PW1 who claimed to have known the appellant as his tenant and next door business neighbor before the incident. PW1 claimed to have recognized the appellant by his voice. We note the complainant's evidence stated that he heard the voice of the accused asking him to produce money since he knew he had it as he had given him change before during the day.

18. In the case of **Roria v Republic [1961] E.A. 583** it was held:-

"a fact maybe proved by a testimony of a single witness but this rule doesnot lessen the need for testing with the greatest care the evidence of a single witness in respect of identification specially when it is known the conditions favouring a correct identification were difficult. That in suchcircumstances there is need for other evidence."

19. In the case of **Karani v Republic [1985] KLR 290** it was held:-

> ***"Identification by voice nearly always amounts to identification by recognition however care must be taken to ensure that the voice is that of the appellant".***

20. We must consider whether the complainant was able to recognize and identify the voice as that of the appellant. We note at the material time of the attack it was fast, sudden in that the door was hit with a stone and it gave in, complainant was hit with a stone and he fell down. It is from that position he claimed to have recognized the appellant's voice. We note the complainants did not state in his evidence in what language the attackers were speaking to him. He did not state when he was giving the appellant change during the day time, they talked and in what language. He did not state that though they were neigbours they used to talk regularly and that he had known the appellant's voice. The complainant as per evidence of PW4 did not inform him that he had identified the appellant by his voice. PW4 did not mention that PW1 was able to identify the appellant by his voice. The complainant in his evidence stated he was familiar with appellant's voice and what it was that made him recognize the voice as of that of the appellant.

21. Upon evaluation of the evidence of PW1 we are not satisfied in all circumstances of this matter that the complainant was able to positively and correctly recognize the voice of the attackers as that of the appellant.

22. In such circumstances there is need for other evidence. We now turn to the evidence on identification of the cap left behind by the attackers. In the case of **Francis KariukiNjiru& 2others vRepublic Criminal Appeal No. 6 of 2001 (UR**) the court had this to say on evidence relating to identification:-

> ***"The evidence relating to identification had to be scrutinized carefully,and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers tothepolice at the earliestopportunity or at all."***

23. The learned trial magistrate in his judgment stated:-

> ***"I hold that the recognition of accused voice by PW1 is adequately circumstantially corroborated by the recovery of accused's cap at scene in a manner that irresistibly points at the guilty of the accused person."***

24. We have very carefully gone through the evidence of PW1, PW2 and PW3 who purportedly identified the cap recovered from the scene of the robbery as that of the appellant.

PW1 stated:-

> "***A cap (hat) was recovered at scene. I saw the cap. I identified it as belonging to the accused. I used to see it. I could see it when accused used to wearit."***

PW2 stated:-

> "***I found an axe and cap. I identified the cap as one belonging to Muriithi, the accused."***

PW3 on his part stated:-

> ***"I found a cap at the door. I recognized as one belonging to a hotel operator nearby who he happens to be the accused herein. It was navy blue cap."***

PW4 stated:-

"We recovered a cap."

25. We note from the evidence of PW1 he did not identify any special mark to show that the cap belonged to the appellant. He did not state the type, the mark and colour of the cap that the appellant used to wear and type, mark and colour of the cap recovered at the scene. Similarly PW2 did not state the type, mark and colour of the cap as the one he knew and that of the appellant. PW3 did give description of the cap that the appellant used to wear as navy blue cap and pointed it was the same as the one recovered. PW3 is the only witness who gave the description of the colour of the cap but did not say that the appellant was the only person with such type of cap in the area. PW1, PW2 and PW4 did not give identification of the cap recovered at the scene as that of the appellant. PW4 testified that they recovered a cap but did say where and the type of the cap. Upon evaluation of the entire evidence we do find and hold that the cap was not properly identified as that of the appellant. The identification of the questioned cap we find that it was not free from error or mistake as such said caps are common consumables found in any shop and any one can acquire such a cap. We also do hold that navy blue colour is also common colour of caps and there was no evidence to show that it was the appellant who had that special cap.

26. The appellant raised the issue of his detention at police cells beyond the mandatory period of 14 days as per provisions of the repealed constitution. He avered that he was detained at police cells for 20 days. We draw our finding on his complaint from the case by **Julius Kanaru Mbugua v Republic C.A. Cr.App.No. 50 of 2008** in which the Court of Appeal addressed itself as follows:-

> ***"It is apparent that some of the reliefs sought did not relate to the ongoing criminal trial. Further, as section 72 (6) entitled a person unlawfully detained to damages, the relief that the appellant be discharged was incompetent.***
>
> ***"Secondly, it was unprocedural to prosecute the petition in presence of assessors as they had nopower to give opinions in an application of that nature. From the foregoing, it seems that in the prevailingcircumstances, the petition should have been heard independently of the criminal trial."***

27. We therefore find and hold that the issue raised by the appellant on being detained beyond 14 days as per repealed constitution to be incompetent in this criminal appeal and hold that the issue should be addressed in a constitutional court.

28. On the issue of the charge being defective, we have very carefully gone through the charge sheet and the provisions of **Section 296 (2) of the Penal Code**. The charge as drawn satisfies the ingredients of an offenceof robbery with violence. The assertion that PW1's evidence or that of the witnesses is inconsistent do not make the charge defective and we so hold.

29. On production of exhibits, we find that PW4 was the proper witness to produce the recovered items being axe, arrow and the cap. As regards production of P3 form the law requires that the maker of such document should produce the same, however the same can be produced on application under**Section 34 of the Evidence Act.** The prosecution applied to have the P3 forms produced as the doctor was away on seminar. The appellant did not object to that production. We therefore find that the exhibits were properly produced after the appellant failed to object to such production.He cannot successfully raise the issue of production of P3 at this stage.

30. Having come to the conclusion that there was no favourable condition for proper, reliable and correct identification of the appellant and that there is no other evidence to convict the appellant with the robbery, we accordingly quash the conviction and set aside the sentence.We order the appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH SEPTEMBER 2015.

R.V.P. WENDOH **J.A. MAKAU**

JUDGE **JUDGE**

24.9.2015 **24.9.2015**