REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEALS NOs 234 and 236 OF 2014

PETER MAINGI KIOKO……..……..... 1ST APPELLANT

BENEDICT MUTUKU NGUMBI……...…… 2ND APPELLANT

VERSUS

REPUBLIC……..…….....…….……RESPONDENT

(An appeal against the original conviction and sentence of L. Simiyu Ag. SRM in Criminal Case No. 1127 of 2013 delivered on 19th November 2014 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The 1st and 2nd Appellants were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 3rd day of September 2013 at Vyulya Market, Vyulya Location in Mwala District within Machakos County, jointly robbed Mutuku Kitonyi of cash Kshs. 1,408/=, a Nokia mobile phone c1230 and 200gms of tea leaves all valued at Kshs. 3,558/=, and immediately before or immediately after the time of such robbery wounded the said Mutuku Kitonyi.

The Appellants were first arraigned in the trial court on 23rd September 2013 where they both pleaded not guilty to the charges against them. They were tried, convicted of the charge of robbery with violence and sentenced to death.

The Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal against the conviction and sentence. The appeals of the 1st and 2nd Appellant were consolidated to be heard and determined together at the hearing held on 23rd July 2015.

The main grounds of the appeals by the 1st and 2nd Appellants are that their conviction was based on the recognition of a single witness without ruling out the possibility of an error, the victim did not mention the names of his attackers whom he claimed to know, the provisions of section 169 of the Criminal Procedure Code were not complied with and that the charge ought to have been that of assault.

Mr. Machogu for the State opposed the appeal and submitted that it was PW1's testimony that on 3rd September 2013 at around 8.30 pm near Ekaimoke bar within Mwala district he was attacked, injured and robbed by persons well known to him. He identified them as the Appellants in this case. It was his testimony that the 1st Appellant was a person he had known since the 1980s and he had been able to see him since there was security light outside the bar. Further, that the evidence by PW1 was corroborated by

PW4 who confirmed that PW1 had sustained injuries sustained at the robbery and that the offence had thus been proven.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. Mutuku Kitonyi, the complainant was PW1 and he testified that on 3rd September at 8.30 pm he was walking home and passed by Ekaimoke bar. He stated that he found the Appellants at the veranda of the bar. He greeted them and walked on. Five steps later someone knocked at his elbow and called out 'mzee', he looked behind and saw the 2 Appellants. It was his account that there was sufficient light from the electric security bulb outside the bar. He was grabbed by the two and dragged to the bushes where they beat him.

Further, that the Appellants also robbed him of Kshs. 1,408/=, tea leaves worth Kshs. 50/=, a nokia mobile C1280 worth Kshs. 2000/= and a safaricom wallet which had his identity card. PW1 testified that he then left the scene and proceeded home where his wife helped him wash up. He later reported the matter to the police and he was given a note to go to hospital. He stated that he had lost his incisor teeth and found one at the scene later the next day. The tooth was marked as an exhibit.

PW2 was James Kilonzo, a clinical officer at Masii health centre, who testified on behalf of Damaris Nyabuto, the clinical officer who examined PW1 on 4/9/2013. He confirmed that there was a P3 form filled by the said Damaris Nyabuto and according to the records there was soft tissue injuries on the face lost incisors in the upper jaw. The injuries were two days old.

PW3 was Mathias Mutuku and he testified that on 5/9/13 at about 11.00 a.m. he picked up a black safaricom wallet which had an ID from beside the road. He said that he recognized the face on the ID and took it to the office of the chief but found it locked up. He later took it to the owner at 7.00p.m.

PW 4 was Virginia Ndinda Mutune the wife to PW1. It was her testimony that on 3/9/2013 at around 9.00p.m her husband returned home with injuries. She stated that he was injured on the face and arm and his shirt was soiled and torn. He told her that he had been robbed and accosted by the Appellants. She said that he was later taken to hospital by his brother. She confirmed that on 6/9/13 PW 3 brought a wallet containing the PW 1's identity card to their home.

Pw 5 was William Bosire a police officer attached at Masii police station. It was his testimony that on 4/9/2013 at about 9.45 a.m., he received a complaint from PW1 that on 3/9/2013 at about 8.00 p.m on his way home from Vyulya market, the Appellants accosted him and robbed him. He told him he knew his attackers who he identified by name, and that there was security lights at the bar that he used to see and identify the accused. PW5 testified that he advised PW1 to go to the hospital and issued him with a p3 form. Further, that he later arrested the Appellants and recovered a safaricom branded wallet. The same had a National ID for the complainant, an elections card, safaricom sim card, housing card, and a manual card, contact card for Daniel Munyao Munage and M-pesa registration pin. The complainant also gave him an incisor tooth.

PW5 stated that at the scene of the crime he saw the bar which was 15-20 meters from the scene; and that there was a bush along the murram road to the bar. That there was an electric bulb hoisted on the bar. He also stated that at the time of arrest the Appellants were positively identified by the complainant who called out their names.

The trial court found that both Appellants had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. Both Appellants gave unsworn evidence and did not call any witness. The 1st Appellant stated he lived in Vyulya and that on 17/9/2013 he woke up and went to work in the garden after breakfast. He later went back home and took his sick brother to hospital. Further, that the next day he went to the shops to buy fertilizer and as he was walking back home he was approached by two people in vehicle who claimed to be looking for him. They took him to Masii where later he was arraigned in court. He said he knew nothing of the crime committed.

On his part, the 2nd Appellant stated that he lived in Vyulya and was a mason. Further, that on 21/9/13 he

woke up and went to work and afterwards at about 5.30pm he went to the barbershop. As he left the barbershop he met two people on the road and one of them told him he was a police officer and the other was the complainant. The police officer claimed to be looking for him he was held and charged him. He also said that the 1st Appellant was a stranger to him, and that he had a dispute with the complainant over the sale of a piece of land. Further, that the evidence against him had been fabricated.

We have considered the arguments made by the Appellants and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

We accordingly find that there are three issues for determination in this appeal. The first is whether there was a positive identification of the 1st and 2nd Appellants; secondly, whether there was sufficient evidence to convict the 1st and 2nd Appellants for the offences of robbery with violence; and lastly, whether there was non-compliance with section 169 of the Criminal Procedure Code.

On the issue raised of the positive identification of the Appellants, the Appellants urged that the complainant was honestly mistaken about being attacked by persons known to him, as there was evidence of sand being thrown in his face which must have obstructed his observation. Further, that despite stating that he knew the Appellant he failed to give the said Appellant's name to the police upon his first report. It was also submitted that there was an error made in convicting the Appellants on the identification evidence of a sole witness. The Appellants relied on the decisions **in Roria vs R E.A. 583, Turnbull vs R (1976) 3 All E.R 549** and **Kiarie vs R (1984) KLR 739** in this respect.

We have on this issue reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

The law on identification is also replete with warnings on the need for caution before sustaining the conviction on the basis of identification of a single witness in difficult circumstances. This was explained in **Maitanyi –Vs- Republic [1986] KLR 198 at 200** as follows:

> **"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 the robbery took place at night, and PW1 stated that he was able to see the Appellants who were on the veranda of a bar on which there was an electric security bulb that was on. He passed the two Appellants at the veranda 2 or 3 metres away, and the 2nd Appellant called out a greeting to him. He also saw the two Appellants during the attack on him and he testified that there was sufficient light to see them. Therefore no difficult circumstances were present as to cloud the complainant's memory, as he had seen the Appellants before they attacked him and also during the attack. We accordingly rely on PW1's sole evidence of identification.

In addition PW1's evidence was clear that his was a case of recognition and not mere identification, and he was consistent in his evidence that the Appellants were well known to him. He stated clearly that he knew the Appellants when he saw them at the veranda of the bar and he identified them by name. His evidence of what transpired during the attack on him was as follows:

"I called Mutuku's name. I asked "Mutuku now that you know me well why are you killing me" Maingi Peter responded in Swahili " Nitakuua Kabisa".

PW1 also testified that he knew Peter Maingi (the 1st Appellant) in 2005 and that the 1st Appellant's grandmother is his aunt. He also stated that he had known Mutuku Ngumbi (the 2nd Appellant) since 1980's. In addition we also note that the 2nd Appellant corroborated PW1's evidence of recognition when he cross-examined him on a land transaction that they were allegedly involved in 2002. We therefore find that there was no mistake in the Appellants' recognition and identification.

On the issue of whether there was sufficient evidence to convict the Appellants for the offence of robbery with violence, the Appellants argued that they ought to have been charged with the offence of assault in accordance with the report made to the police and not with the offence of robbery with violence. The prosecution however in this case thought it more prudent to charge the Appellants with the offence of robbery with violence, and the issue is whether the burden of proof for this offence was discharged as required by law. Nothing precludes us from substituting the offence with the lesser offence of assault if we indeed find that this burden of proof was not discharged.

We are alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. We are in this respect also guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

> **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in the company with one or more other person or persons, or**
>
> **3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

The Appellants were two and therefore in the company of more than one person at the time of the robbery and attack on PW1, and one of the ingredients of the offence of robbery with violence was accordingly met. They were also positively identified by PW1. Lastly, evidence was brought by PW1 about the injuries he suffered arising from the attack by the Appellants including a swollen mouth, lost tooth and swollen eyes. PW2 also gave the evidence of the injuries suffered by PW1 upon medical examination as shown in the P3 form he produced as an exhibit in court, and that showed facial soft injuries, lost incisors of the upper jaw and a bite injury on the left upper hand of PW1. It is thus our finding that that there was sufficient evidence to convict the Appellants with the offence of robbery with violence, and that the said conviction was safe.

The last issue is whether there was compliance with section 169 of the Criminal Procedure Code. The said section provides a s follows:

> **"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
>
> **(2) In the case of a conviction, the judgment shall specify the offence of which, and the section**

of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

We have perused the judgment delivered by the trial magistrate, and we find that he analysed the evidence that was adduced by both the prosecution and defence as well as the ingredients of the offence of robbery with violence. The trial magistrate after undertaking this analysis found that two ingredients had been shown to exist under section 296(2) of the Penal Code and that the prosecution had proved their case and convicted the Appellants. The reasons for his findings are therefore evident. The record also shows that the trial magistrate thereupon sentenced the Appellants to death according to the law.

We accordingly uphold the conviction of the Appellants for the charge of robbery with violence contrary to section 296(2) of the Penal Code, and the sentences of death for these convictions are found to be legal.

It is so ordered.

DATED AT MACHAKOS THIS 17TH DAY OF SEPTEMBER 2015.

P. NYAMWEYA

JUDGE

L. NJUGUNA

JUDGE