REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 91 OF 2014

Consolidated with CRA No. 92 of 2014

STEPHEN GICHUNGE KIMATHI…….....…….1ST APPELLANT

NICHOLAS KIMATHI……...……..2ND APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

(Being an appeal from original conviction and sentence in criminal case No.1692 of 2007 at Nkubu SPM's Court before Githinji S.M. – SPM on 29th March, 2011)

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

JUDGMENT

The Appellants, **STEPHEN GICHUNGE KIMATHI** and **NICHOLAS GITUMA KIMATHI** were charged with the offence of robbery with violence, contrary to section 296 (2) of the Penal Code CAP 63 of the Laws of Kenya.

The particulars of the offence were that on the 19th day of September 2007, at Taita village, Kathera Location in Imenti South District, within Eastern Province, jointly and while armed with a dangerous weapon, namely a *panga*, robbed **JENNIFER NKATHA MUTWIRI**, of one hand bag, an ATM card, Identity Card, NHIF card, pay slip for the month of August 2007 and cash KSh. 200/= and at or immediately before or immediately after the time of such robbery, used actual violence on the said Jennifer Nkatha Mutwiri.

The Appellants were convicted of the offence and sentenced to death. The Appellants are aggrieved by the conviction and sentence and therefore filed CRA 91/2014 Nicholas Gituma v Rep and CRA 92/2014 Stephen Gichunge v Rep. The two appeals were consolidated and the lead file is CRA 91/2014. In summary, the appellants' grounds of appeal are as follows:

1. That the Learned Trial Magistrate erred in law and fact in failing to note that the alleged identification/recognition was not free from possibility of error;

2. That the Learned Trial Magistrate erred in law and facts in failing to note that the presentation of the exhibited items fell short of the required standard in law;

3. That the Learned Trial Magistrate erred in law and facts in failing to make a finding that the provision of Section 150 of the Criminal Procedure Code was flouted during trial;

4. That the prosecution witnesses tendered uncorroborated and contradictory evidence;

5. That the trial was conducted partially and irregularly;

6. That the Learned Trial Magistrate erred in law and facts in failing to consider the appellants sworn defences.

They urged the court to allow the appeals, quash the conviction and set aside the sentence. The appellants filed written submissions on which they relied entirely.

The appeal was opposed by Mr. Musyoka, Counsel for the State, who submitted inter alia that the evidence tendered by the prosecution witnesses was overwhelming and devoid of any contradictions and that the evidence of PW1 (the complainant) was in tandem with that of PW2, 4 and 5.

Being the first appellate court it behoves us to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and to draw our own conclusions. We are alive to the fact that we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. We are guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu And Another v Rep (2005) 1 KLR 174** where the Court of Appeal held thus:

"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.."

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should 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.."

The prosecution's case was as follows; On 19/9/07 about 6.00 p.m. **(PW1) JENNIFER NKATHA MUTWIRI** was coming from prayers at the house of one Rebecca Magaju her neighbour; that they were many at the said house but she left with one Josephine M'Irangu and Regina M'Irangu. On the way, they met two men. The men turned and walked ahead of them and stood at the junction. At the junction, Josephine and Regina branched to go a different direction leaving PW1 to walk home alone. The two men then followed her and about fifty meters ahead, one of them came, held her by the neck from behind and used the scarf she had to cover her mouth. The attackers made her to fall down to the ground and she struggled with one to uncover her mouth while screaming. While still on the ground, one of the robbers cut the strap of her handbag with a *panga* and ran off with it in the direction she was going while the other continued holding her. As members of the public came to the scene, the one who was holding her bit her near the shoulder, rose and ran away whereupon he was chased. PW1 also followed and found a group of people having caught both suspects with her handbag which had her ATM card, pay slip, identity card, NHIF card and Kshs 200. She later reported the incident at Nkubu police station and recorded her statement. The appellants were strangers to PW1.

PW2 REBECCA NKATHA recalled that she left Rebecca Magaju's house with PW1 and other women; that PW1 took a short cut; that when they got to a place where they were to cross road to get home, they met one of the appellants holding a knife. They tried to get close to him but he threatened them with the knife; that some other people came and chased him and that he was arrested with a knife and handbag. She further testified that she could not tell which of the two appellants was holding a knife since it was a bit dark about 7.00 p.m. and she could not see his face well but saw him holding the knife high. She said that another suspect was arrested ahead. The appellants were later arrested and taken to the police station.

PW3 CHRISTIAN GAKII recalled that on 19th September at 6.00 p.m., she was at home when she heard people screaming along the road. She rushed to the scene and met a man carrying a *panga* and a handbag. He threatened her and she retreated inside her home. After the man had passed, she went to the road again and saw a crowd of people following the man saying he was a thief. She joined the chase and another man who had been near her home joined the chase and managed to arrest the 1st appellant; that the 1st appellant struck the man with a *panga* and the man blocked it using a sprinkler; that the 1st appellant then fell down and she took the bag from him. Other people then came at the scene and another woman (PW1) who said that she was the victim arrived. The 2nd appellant also came pretending to be assisting in the arrest and the victim also said that he was also a thief. He tried to escape but was arrested at the scene.

PW 4 PC RONALD MUKANGAI of Nkubu police station rearrested the appellants from members of the public who were in the company of PW1. PW1 reported having been attacked and robbed by the two men of her handbag containing Identity Card, ATM card, pay slip and NHIF card which were recovered. He also received a *panga* allegedly recovered from the 1st appellant. He charged the appellants with the offence of robbery with violence.

PW5 SILAS MUTWIRI testified that on 19th September 2007, he was in the house of his brother when he heard a scream along the road. He rushed there and found that his brother's wife had been attacked by two men who run away after they saw members of the public. They chased them and arrested them and recovered a bag and a panga. The handbag had a pay slip, ATM card, Identity card and Kshs 200. They then took the appellants to the police station.

PW6 SEBERINA KAIMATHIRI, a clinical officer at Kanyakine hospital produced a P3 form in respect of Jennifer Nkatha (PW1) who had sustained injuries on the head, both knees and hands and mouth, tenderness on interior aspect of the neck and her upper lips had bruises. Her chest was tender and her upper arm and elbow had swelling.

After the close of the prosecution case, the appellants were called upon to enter their defence. The 1st appellant's defence was entirely adopted by the 2nd appellant. He testified that on the material day, they were at their land at Kionyo having been called by their father to go and harvest tea. At about 3.00 p.m., their father released them to go back home but they could not get a vehicle back home as it was late whereupon they decided to walk home. They used a shortcut and after walking for about 2 kilometers, they met a crowd of people who stopped them and asked them where they were from and where they were going. After walking for a while, they met another group of people who included PW1 and 4 and the sub area of the Area who was not a witness in this case; that the sub area knew the 1st appellant as he had previously worked for him in his bar. PW5 then said that the 1st appellant had stolen his brother's wife's items whereby he was led to the home of PW1 and told to carry a bag to the police station. While there, PW4 said that he should accept to be charged with a bailable offence. He was later charged with simple robbery which was later elevated to the current office.

We have carefully considered and reevaluated the evidence on record, the submissions by the appellants and the State Counsel. In the instant case, it is not in dispute that the incident happened between 6.00 p.m. to 7.00 p.m. PW1 said it was about 6.00 p.m. that she left prayers and so did PW2. PW2 then stated that she could not differentiate between the two appellants as to who had the knife and who did not because it was about dark at 7.00 p.m. PW3 said the incident took place between 6.00 p.m. and 6.30 p.m. and likewise PW5 talked of 6.30 p.m. The 1st appellant said it was 7.00 p.m. while 2nd appellant talked of 6.00 p.m. We are of the view that the appellants were arrested at dusk between 6.00-7.00 p.m. PW1 testified that the appellants were unknown to her prior to this incident. We are alive and we have warned ourselves of the fact that the incident having happened at dusk, conditions were not favourable to a positive identification.

In the case of **Abdullah Bin Wendo v Rex 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any

conviction on it. The Court held as follows:

"**Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the 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 instant case, PW 1 gave a detailed and clear account of how the assailants first walked ahead of her and stopped at the junction and after she passed, she was attacked by the two assailants from behind by felling her on the ground whereupon she screamed and her assailants ran away after one took and fled with the handbag while another still held her, prompting members of the public to give chase whereupon they arrested the assailants shortly thereafter. In cross examination by the 1st appellant, PW1 stated as follows:

"**the second accused fell me on the ground, I saw you while on the ground as my eyes were open, I had laid on my side, after arrest you were forced to sit down, the handbag and the panga were placed before you…."**

In the instant case, we are satisfied that even though the conditions at the time might not have been favourable for positive identification, PW1 was able to positively identify her assailants because although they ran from the scene, they were chased and arrested soon after the occurrence. PW1's evidence was further corroborated by that of PW2, 3 and 5. The three were in the group that chased the robbers who had taken the handbag and had a knife *(panga).* PW2 was one of the people who first started chasing the robber who had the handbag and knife. PW3 joined the chase and she is the one who retrieved the handbag from the 1st appellant after he fell. It was the 1st appellant who was carrying the handbag and the *panga* and PW1 told the court that he is the one who had ran off with it. The handbag contained PW1's personal documents which were produced as exhibits. We are satisfied that the 1st appellant was arrested shortly after the incident with PW1's personal effects a fact which remained uncontroverted throughout the trial. The 2nd appellant was with the 1st appellant, a fact he confirmed in his defence. The finding of the recently stolen goods with the 1st appellant put him at the scene of the said robbery. The 2nd appellant also admitted to having been with the 1st appellant.

We associate ourselves with the findings of the Learned Trial Magistrate when he stated as follows in his judgment:

"**the incident took place between 6:00PM and 6:30PM. At the time, there was still light and the witnesses were able to see. The evidence of pw1 is that she saw her assailants and was able to positively identify them a few minutes later after they were held by members of the public. She was able to point out what each accused did during the incident. She stated that the 2nd accused held on her neck, fell her down, gagged and injured her. The 1st accused was armed with a** panga**, cut her handbag strap, grabbed it and ran away with it. Her evidence is corroborated by the evidence of the witnesses who chased after the assailants and effected their arrest. These are PW3 and 5. They stated clearly that it is the 1st accused who had the** panga **and the handbag during arrest. The investigation officer also confirmed that is the report he received. It is only pw2 who appeared confused and mixed up by saying second accused had items. However, her case is understandable as she alleged she did not see clearly. I however, do find the correct position firmly established by pw1, 3, 5 and 4 who was told about it. It is clear all through the complainant saw the assailant to an extent of being able to identify them as the statement was carried in relevant records, which included her P3 form. Accused were arrested soon after the incident, which makes chances that a mistake could have been done nil. Complainants mind was still very fresh about their recorded images and recalled it immediately with no chances of a mistake…"**

We are satisfied that PW1 positively identified the appellants as her assailants who were arrested soon after the incident with the stolen items. Further both PW1 and 2 were candid enough in their testimonies that the appellants were strangers to them prior to this incident. PW2 was more particular that she could not tell which of the two appellants had a knife. They therefore had no reason to frame the appellants.

We note however that there were some contradictions in the testimonies of PW1 and 2 as they seemed to give different accounts of the events of that day. Whereas PW1 stated that it was the 1st appellant who ran off with the *panga* and the handbag; PW2 on the other hand said it was the 2nd appellant. she further talked of the 2nd appellant having been armed with a knife. However the possibility that PW2 may have been mistaken cannot be ruled out since she admitted that it was a bit dark and she could not see properly. Besides, the appellants were in motion, running when she saw them. In the case of **Njuki v Rep (2002) 1 KLR 771**, it was stated as follows:

"**in certain criminal cases, particularly those which involve many witnesses' discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused……however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

Consequently, we find that the discrepancies/contradictions in the prosecution case are not material and do not go to the root of the matter and we shall overlook the same.

With regard to the contention that the Learned Trial Magistrate flouted **Section 150 of the Criminal Procedure Code CAP 75 of the Laws of Kenya** and denied the appellants a chance to call their witnesses; the said Section provides as follows:

"**a court may at any stage of a trial or other proceedings under this Code summon or call any person as a witness, or examine though not summoned as a witness, or recall and reexamine a person already examined and the court shall summon and examine or recall reexamine any such person if his evidence appears to it essential to the just decision of the case.."**

In the instant case, it is apparent from the record that on 20th September 2010, the appellants sought to have the witnesses recalled for further cross examination. The accused had been put on their defence way back on 17/5/10. They did not specify the witnesses that they wanted recalled for further cross examination. The Trial Court on the same day delivered a short ruling declining the said application for recalling of witnesses stating that the appellants had been given time they required in court to cross examine witnesses, individually, to their satisfaction and exhaustion and that the appellants had not advanced any reasonable ground for the court to allow recalling of all the witnesses. The appellants were dissatisfied with the said ruling and intimated to the Trial Court that they wished to appeal the ruling to the High Court. The Trial Court granted them leave to appeal the said decision within 14 days.

On 4th October Mr. Mutuma Advocate came on record for the two appellants though they were previously unrepresented and he sought more time to file an appeal saying he had just been instructed, which application was allowed by the Trial Court giving them more time to appeal the ruling. On 18th October 2010, the court noted that the appeal had not been filed and the appellants' advocate was not even in court to explain the delay. The defence hearing date was fixed for 4th November 2010. We must point out that **Section 150 of the CPC** grants the court the discretion to call any witness if the evidence will assist the court arrive at a just decision. This is a discretion donated to the court and we are of the opinion that failure to grant the application was not prejudicial to the appellants because it was not the court that required the recalling of the witnesses. The Learned Trial Magistrate in declining to order recall of the prosecution witnesses gave the reasons as to why he declined the application.

On 4th November, 2010 when the defence was to be taken, the Court was indisposed and the matter was fixed for hearing to 28th February 2011. On the said date (28/2/11), the appellants intimated to court that their advocate and witness were not in court and prayed for another date. The Trial Court again indulged

them and set the defence hearing date to 8th March 2011. On 8th March again, the appellants intimated to court that they did not have their witness but were ready to proceed. From the record, it is clear and apparent that it is the appellants who intimated to court that they wished to proceed without their witness. The allegation by the appellants that they were denied a chance to call their witness is therefore far from the truth. In any event, the court indulged them severally. The only logical inference that can be made is that the appellants did not have a witness and were only playing delaying tactics.

The appellants also urged that their defences were not considered by the court. This is far from the truth. The Learned trial Magistrate considered the defences and found the appellants defences to be untrue and a mere denial noting that the witnesses had no cause to frame the appellants. PW1 was categorical that the appellants were unknown to her prior to this incident. She therefore had no cause to fix the appellants. PW2 and 3 who helped the appellants did not know the appellants before. The 1st appellant seemed to blame PW4 (though in our opinion we think they meant PW5 as there was an error in numbering) for his predicament by saying that PW5 had said that they had stolen their brother's wife's items. Although the 1st appellant claimed that he knew PW1 because he worked for him with the brother in his bar for a year, the 2nd appellant denied knowing any of the witnesses. The 1st appellant had an opportunity to cross examine PW1 and 5 and at no time did he allude to the fact that they knew each other before and that there existed a dispute between him and either PW1 or 5. The appellant's defence cannot be true and we accordingly reject the same as an afterthought and untrue. The appellants did not raise these issues during the hearing of the case and they only raised it in their defence.

To found an offence of robbery with violence under **Section 296 (2) of the PC,** the prosecution has to prove the following:

1. that the offender is armed with a dangerous weapon; or

2. that he is in the company of one or more other persons or

3. that, at or immediately before or after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person.

In **Johana Ndungu v Rep CRA 116/1995**, the court stated:

"If any of these are proved, it will constitute the offence of robbery with violence".

In this case, it is obvious that the appellants were two, when they accosted PW1; the 1st appellant was armed with a *panga* (knife) and they visited violence on PW1. PW4 confirmed that PW1 was injured. Whereas only one of the above ingredients was required, the three ingredients were proved and we find that an offence of robbery with violence was proved.

Having considered the totality of the evidence tendered in this case, we find that the same was overwhelming and sufficient to found a conviction. Consequently, we do hold and find that the conviction entered against the Appellants was safe and we uphold it.

On sentence, the appellants were given the mandatory death sentence as by law provided. The sentence was therefore lawful and legal and we find no basis for interfering with the same. We accordingly dismiss the appeal.

DATED AND SIGNED AT MERU THIS 29TH DAY OF OCTOBER, 2015.

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

JUDGE **JUDGE**

DELIVERED AT MERU THIS 29TH DAY OF OCTOBER, 2015.

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

JUDGE **JUDGE**

PRESENT

Mr. Mungai for State

In Person, for Appellants

Peninah/Ibrahim, Court Assistants

Both Present, Appellants