**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA ATNAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 16 A OF 2012**

**GEORGE GIKERIA NJIHIA…………APPELLANT**

**VERSUS**

**REPUBLIC………………………….RESPONDENT**

*(Being an appeal from original conviction and sentence contained in the Judgment of Hon. T. Murigi (Principal Magistrates) at Chief Magistrate's Court at Makadara in Criminal Case No. 460 of 2008 delivered on 20th December,2011*

**JUDGMENT**

This appeal challenges both the conviction *and* sentence entered against the Appellant who faced two counts of the offence of robbery with violence contrary to Section 292(2) of the Penal Code. It was alleged that on the night of 25th February 2008 at around 2207 hours, at Githurai Estate in Nairobi, the Appellant jointly with others not before court, robbed Gladys Mwangi of one mobile phone make Siemens V52, DVD make LG 276 and Ksh. 32,000/- all valued at Ksh. 38,300 and at or immediately before or immediately after the time of such robbery used actual violence on Gladys Mwangi.

On the second count, the particulars were that on the night of 25th February 2008 at around 2207 hours, at Githurai Kimbo Estate in Nairobi, the Appellant jointly with others not before court, robbed Michael Mwangi Chege of one mobile phone make Motorolla C118, and Ksh.600/- all valued at Ksh. 31,000 and at or immediately before or immediately after the time of such robbery used actual violence on Michael Mwangi Chege.

The prosecution called three witnesses. PW1, Glady Wanjiku Mwangi testified that on the material night, she was leaving for home from work at about 10.00pm in the company of a neighbour, Michael Mwangi Chege. She that stated the attackers took her mobile phone and money she had placed in a tin. Thereafter, PW1 screamed and one of the attackers, the Appellant followed her to a plot. He hit her with a *panga* and took her DVD. She reported to the police the same night and was also treated. On the day after the attack, as she was heading to the hospital, she spotted the Appellant. She notified the police nearby who arrested him. At the police station, PW1 requested that the Appellant's house should be searched. A black T-shirt that was said to have been worn by the Appellant at the time of the attack was recovered. The Appellant was consequently charged.

In his defence, the Appellant gave an unsworn testimony and did not call any witness. He denied the charges against him. He testified that he was falsely accused of the charges owing to a grudge between himself and a police officer regarding payments that he had demanded from him.

He was subsequently found guilty of the offence and sentenced to death. Dissatisfied with the findings of the trial court, the Appellant appealed against both the conviction and sentence.

The Appellant relies on the following four grounds of appeal: Firstly, that the trial Magistrate erred in finding there was sufficient evidence of identification by recognition; secondly, that trial court erred in relying on the evidence of a single witness; thirdly, that the Appellant's defence was dismissed without good reason and finally, that the trial court erred in convicting the Appellant in the absence of evidence of the Appellant's arrest.

This appeal was argued by way of filed written submissions and additional oral submissions made at the hearing of the Appeal. The Appellant was represented by the firm of Ishmael & Company Advocates. It was submitted that the prosecution evidence was insufficient, uncorroborated and incredible; that PW1 gave inconsistent accounts in her initial testimony and her subsequent testimony when she was recalled when another Magistrate took over the case. In particular, her initial testimony she had indicated that she was cut with a *panga* on the right leg and hip yet subsequently said that one of the robbers had hit her with a *panga* on the head. Furthermore, there was no evidence of any cuts by the doctor who examined her three days after the attack. PW1's account was also faulted as being unreliable for stating that her DVD was stolen but later indicated in her testimony that the DVD was at home.

The Appellants cited other inconsistencies regarding the time the attack was said to have taken place and the details of where PW1 sought medical treatment following the attack. The trial Magistrate was faulted for making extraneous findings on the injuries suffered by the complainant. It was also submitted that the identification of the Appellant was not proper since no details were given at the first report and no identification parade was carried out. The Appellant also submitted that the charges against him were defective since the Appellant was charged under the penalty provision of the law. In further submissions made in court, Mr. Nguring'a for the Appellant submitted that the Occurrence Book (OB) extract was ambiguous in its contents in that the OB extract no. 25/26/2/2008 which is reflected in the charge sheet did not contain the name of the Appellant while another OB no. 30/25/2/2008 which did not feature in the proceedings gave an account of the Appellant's arrest.

In submissions filed by Ms. Ndombi for the Respondent, it was submitted that the charges were sufficiently proved for the reason that the Appellant was properly identified through his appearance and the colour of the T-shirt that he was wearing. Furthermore, PW3 recovered the T-shirt that the Appellant wore during the attack, which bore a white imprint of no. 4 at the back. Further, the conditions favouring identification was available because there had been sufficient light from the security lights where the attack took place. In all, the ingredients of the offence of robbery with violence were all met and therefore the appeal ought to be dismissed for lack of merit.

We have now considered the entire evidence and the respective rival submissions. We are the first appellate court whose duty is to re-evaluate the evidence and arrive at our own independent findings but bear in mind that we have neither seen nor heard the witnesses, **See Okeno v Republic (1972) EA, 336.**

On the issue of a defective charge sheet, it was submitted that the charge only spelt out the penalty clause, **Section 296(2)** of the Penal Code was cited in the charges without including **Section 295**. We dismiss this ground from the outset since the provision being challenged clearly sets out the elements of the offence the offence of robbery with violence in the following terms:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"***

**Section 295** is a generic provision which only gives a definition of the term robbery. Thus, **Section 296(2)** is sufficient since it describes both the elements and the sentence for the offence of robbery with violence. This reasoning is fortified by the reasoning of the Court of Appeal in the case of ***Simon Materu Munialu v. Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** where it stated thus,

> ***"…the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with …is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion….In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment.***

Turning on to the issue of identification, the Appellant faulted the trial Magistrate for relying on the evidence of a single witness, and for finding that the identification was proper. The sufficiency and consistency of the evidence were also challenged. Several points of inconsistencies were highlighted. It was alleged that PW1 was unreliable for indicating that the DVD was stolen and later on stating that it was at home. An examination of the typed proceedings indeed indicates that PW1 later in her testimony indicated that the DVD machine was at home. However, having resorted to the original handwritten court proceedings, the record shows that his statement was that the DVD receipt and not machine was at home. She was stood down to enable her produce the receipt in court. With respect to the treatment of PW1, PW2 indicated that PW1 had been first treated at Good Health Clinic indicated in the medical treatment notes. PW1 herself stated that she first went to a private clinic. The inconsistency was cited in the testimony of PW3. PW3 stated that PW1 spotted the Appellant the following morning on her way to St. Johns Githurai. In her testimony, PW1 stated that she was going to the hospital the following morning for an X-ray. We find no inconsistency in that evidence as it is not disputed that she sought treatment on the same night she was attacked at a private clinic. The details of the hospital she visited the following day are not provided and do not affect the material aspects of this case.

The Appellant also poked holes regarding the time the offence took place and the injuries sustained. We observed that this matter started de novo at the court's own motion when the initial trial magistrate was transferred. Hence, the evidence to be considered is the evidence tendered when the new Magistrate took over. It is not denied that PW1 suffered injuries. She testified that she was hit on the head with a *panga* and kicked on the leg. PW2 confirmed that PW1 had an injury on the right temporal mandible area and watery discharge from the right ear. He concluded that the probable object that was used was blunt. Even if there was no evidence of any bleeding or cuts, we find there was evidence to support PW1's claim that she was hit and that force was used against her.

With regard to the time the offence took place, PW1 stated that they were attacked after 10.00 p.m when they left for home from work. When she was recalled at a later date, she indicated that the offence took place at about 9.15 p.m. and that she reported to the AP post at 10.07 p.m. and was treated at 10.00 p.m. From this account, it is true that there are some inconsistencies as to the time the attack took place. The charge sheet indicated that the offence was committed at (2207) 10.07p.m. While these inconsistencies exist, we find that they are not material in that there is consistency as to the fact that the offence was committed at night and sometimes it is difficult to recall the exact time the offence was committed. As such, the inconsistency was not fatal to the case. As stated by the Court of Appeal in ***Erick Onyango Ondeng' v Republic*** **Criminal Appeal No. 5 of 2013, [2014] eKLR,** citing with approval the decision of Court of Appeal in Uganda in the case of ***Twehangane Alfred v. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6:***

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do***

***not affect the main substance of the prosecution's case."***

The other issue for our determination is whether the Appellant was properly identified as to justify a conviction. We observe that the evidence relied upon is that of a single identifying witness for an offence that took place at night. It has been long-held that a court relying on such evidence must warn itself of the dangers of convicting on the basis of such evidence; and must test that evidence with the greatest care. We find that the trial Magistrate applied this caution well. In the case of ***Charles O. Maitanyi v Republic* [1985] 2 KAR 75 in the following words:** the Court of Appeal held:

> ***"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.***
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> ***There is a second line of inquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify the accused, the recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."***

The only identifying witness was PW1 who was attacked at night. She indicated that she was able to see the Appellant at the plot which was lit with security lights. She stated that even though they were initially attacked in a dark area where she would not have been able to identify the attackers, she was able to see the attacker who followed her inside the plot and hit her with a *panga.* It would have been important that there was a description of the sufficiency of lighting. We must consider the evidence in entirety before dismissing it on this aspect.

PW1 testified that she was able to see the Appellant clearly as he left carrying a DVD, since he wore a T-shirt that was imprinted with No. 4 at the back. She gave this description to the police. According to PW3, PW1 had said that the attackers had not been known to the complainant before. PW1 in her evidence however, indicated that she pretended that she did not know the attacker for fear of being killed although she added that she did not give the police the assailant's name.

The complainant testified that she recognized the attacker when she saw him on the day following the attack and notified the police nearby who came to arrest him. The first piece of evidence of identification was recognition of the attacker. Following a request by PW1, the police recovered a T-shirt that fitted the description given by the complainant. This recovery was made by PW3. The Appellant was arrested following a notification by PW1. This evidence was confirmed by PW3.

We find that the evidence of recognition of the Appellant as the person who attacked her was fortified by the description of the clothes said to have been worn by the attacker and aptly described by PW1. This gives credence to her testimony of having recognized the attacker. We therefore, find that the Appellant was properly identified.

The evidence before us satisfies the elements of robbery with violence. The complainant was attacked by more than one assailant, and robbed of money and property. She also suffered injuries. The Appellant was properly identified as one of the persons who accosted the complainant. We observe that the Appellant was charged with two counts of offences of robbery with violence to which he pleaded. The second count however was not proved since the complainant in that charge was not called to testify. The Appellant

ought to have been acquitted of the second count. The learned magistrate erred in not pronouncing the verdict in its respect. We find that the prosecution did not prove the same beyond all doubts and we acquit him accordingly.

In the end, we confirm the conviction and sentence in respect of the first count. The same was proved to the required standards. This appeal lacks merit and the same is dismissed.

**DATED** and **SIGNED** this **27th** day **October**, **2015**

**L. KIMARU**

**JUDGE**

**G. W. NGENYE- MACHARIA**

**JUDGE**

**In the presence of;**

Appellant present in person

Ms. Aluda for the Respondent.