REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 197 OF 2012

(An appeal arising from the judgment of Principal Magistrate's court at Vihiga in Criminal Case No. 478 of 2011 [G. Mmasi, PM] delivered)

PETER SAMBAYA KITINGA …….....……..…. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court jointly with two other persons. The appellant was 2nd accused. Geoffrey Mukalla Ogoli and Phillip Andai were 1st and 3rd accused respectively. They were jointly charged with three counts. Count I was for robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the charge were that on 5th May, 2011 at Salide village in Hamisi District within Western Province jointly while armed with dangerous weapons namely pangas and stones robbed Maurine Mingize of a mobile phone make Motorola C113 and immediately before or immediately after the time of such robbery wounded Maurine Mingize. Count II was also for robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the charge were that on the same day and place jointly while armed with dangerous weapons namely pangas and stones robbed Benson Kirasesa of his mobile phone make Nokia 2610 and cash Kshs.300/= all valued at Kshs.2,300/= and at or immediately before or immediately after such robbery wounded Benson Kirasesa. Count III was for assault causing actual bodily harm contrary to **Section 251** of the Penal Code. The particulars of the charge were that on the same day and place assaulted Shem Shinzone thereby occasioning him actual bodily harm.

They all denied the charges. After a full trial, the appellant was found guilty on all the three counts. He was sentenced to suffer death on count I. The sentence on Count II was held in abeyance. He was sentenced to serve six months suspended imprisonment sentence on count III. The other two accused were convicted on count III for assault and each fined to pay Kshs.20,000/= or serve six months imprisonment.

The appellant was aggrieved by the decision of the trial court and has now appealed to this court on several grounds, challenging the conviction and sentence. The appellant also filed written submissions. In the submissions, he contended that his identification was not positive. That he was not described in the first report to the police. That there were contradictions in the evidence of prosecution witnesses especially PW1 and PW3. He also contended that some crucial witnesses were not called by the prosecution to testify. He stated that the crucial witnesses were the neighbours who came to the scene soon after the incident and the assistant chief.

The learned State Counsel Ms Opiyo, opposed the appeal, and supported both the conviction and sentence. Counsel argued that PW2 knew the appellant since childhood. In counsel's view, the prosecution had proved its case against the appellant beyond reasonable doubt as there was adequate light in the room.

In brief, the prosecution evidence is that PW1 and PW2 who were wife and husband were sleeping in their house which was also a kiosk on 5th May 2011. A hurricane lamp was alight in the room. While PW2 who was the husband was asleep, PW1 was suckling a young child. Suddenly, at about 11 p.m. they heard a bang on the door and about five people entered the room. According to PW1 and PW2, one of the attackers with a nickname. Sheza, the appellant threatened PW1 and cut her with a panga. He also demanded money from PW1 and PW2. He took away mobile phones from both. He injured PW2 with a panga.

PW1 and PW2 screamed. On hearing the screams PW3, the father of PW2, rushed from his house which was nearby to the scene. On arrival, he saw one of the attackers called Andai, the 3rd accused attempting to cut PW2 with a panga. He also saw one of the attackers called Geoffrey the 1st accused cut PW2 with a panga.

The grandfather of PW2, who testified as PW4 also rushed to the scene. He attempted to intervene together with his wife PW5, but on being threatened withdrew from the scene.

PW2 was admitted to hospital due to the injuries suffered. Investigations were then conducted by the police. The appellant and his co-accused were arrested later with the assistance of the chief and members of the public. They were then charged in court.

In their defences, all the three gave sworn statements. They denied the charges. Faced with the above evidence the learned trial magistrate convicted the appellant on all three counts, sentenced him to suffer death on count I, suspended the sentence on count II, and ordered him to serve a suspended sentence of 6 months on count III. Therefrom arose this appeal. The other two accused who were convicted in count III and sentenced to a fine of Kshs.20,000/= or 6 months in prison did not appeal.

This appeal has risen from the above proceedings.

This being a first appeal, we are duty bound to evaluate all the evidence on record afresh and come to our own conclusions and inferences. See **Okeno vs Republic [1972] EA 32.**

We have evaluated the evidence on record. The conviction of the appellant was predicated on the evidence of identification, both visual and by voice.

Both PW1 and PW2 claim to have known the appellant from childhood as a neighbour. There is however, no record that they mentioned the names of the appellant or his description to any of the people who initially came to the scene that night. Their first report to the police also does not indicate that the appellant was mentioned or described as one of the assailants. It was merely PW2 in his statement to the police which was recorded later after he was discharged from hospital that he mentioned the name of Sheza as one of the assailants. Even with that, there is no indication in the charge sheet that the appellant had such a nickname. The appellant denied the said nickname. There is therefore no initial description of the appellant from eye witnesses that could connect him to the crime.

No evidence was tendered to support identification by voice. On visual identification or recognition, the two eye witnesses, PW1 and PW2 claim to have known the appellant before. This would mean that the identification was through recognition which would be more reliable than mere identification of a stranger. However, even in cases of recognition, the court should exercise caution and warn itself before founding a conviction on such evidence. In the case of ***Paul Etole & Ano. Vs Republic CA No. 24 of 2000 (Ur)*** the Court of Appeal expressed itself thus with regard to identification through recognition. -

"Evidence of visual identification can bring about a miscarriage of justice.

But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness on one or more identifications of the accused, the court should warn itself of the need for caution before convicting the accused.

Secondly, it ought to examine closely the circumstances in which the identification by each of the witness came to be made.

Finally, it should remind itself of the specific weaknesses which had appeared in the identification evidence.

It is true that recognition may be more reliable than identification of a stranger – but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence."

In our present case, there is no description of the intensity of the light from the lantern lamp. There is no description of how far and in what position the lantern lamp was from PW1 and PW2 and the appellant, when the appellant was so recognized. There is no description of how long any of the witnesses had visual contact with the face of the appellant. The evidence on record is that the attackers came with powerful torches which they were flashing. The evidence of recognition from the light of the lantern lamp is not free from possibility of error. In our view also, the light from the powerful torches would blur the vision of the witnesses. In addition, the circumstances of the incident were such that the two witnesses must have been scared by the unexpected attack on them at night. The above, coupled with the fact that there was no evidence of an initial report to the first people who came to the scene and to the police on the identity of the appellant, leads us to the conclusion that the identification of the appellant was far from positive. It cannot be a basis for sustaining a conviction.

In addition, the prosecution failed to call key witnesses to testify. These were the Assistant Chief and any independent member of the public who came to the scene. The Assistant Chief led to the arrest of the appellant. He was therefore a crucial witness with regard to the circumstances and reasons of his arrest. He should have been called by the prosecution to give the circumstances and reasons why he was arrested. The members of the public, who first came to the scene, would have been independent witnesses. In our view, the failure to call these crucial witnesses created a big gap in the prosecution case. A failure to call crucial such witnesses without any explanation entitles the court to draw an inference that the evidence of those witnesses would not support the prosecution case. See the case of ***Bukenya -vs- Uganda [1972] EA 549***.

In the circumstances of the present case, we draw the inference that the failure to call crucial witnesses adversely affected the prosecution case.

Thirdly, the appellant gave sworn testimony in his defence. The prosecution did not seriously challenge his version of the story in cross-examination. The learned trial magistrate did not put the scales to evaluate the evidence of the prosecution as against the defence case. In our view, there was an omission on the part of both the prosecution and the learned trial magistrate. We are of the view tht had the learned magistrate weighed the evidence of the prosecution against the defence, he would not have convicted the appellant.

We wish to add that the learned trial magistrate erred in sentencing the appellant after passing a sentence of death. The proper course would be to hold sentencing for the other offences in abeyance.

Having re-evaluated the evidence on record, we come to the conclusion that the conviction of the appellant on all the three counts was not safe. It is not sustainable. Consequently, we allow the appeal, quash the convictions and set aside the sentences imposed. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 29th day of January, 2014

SAID J. CHITEMBWE **GEORGE DULU**

JUDGE **JUDGE**