REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 143 OF 2012

(From Original Conviction and Sentence in Criminal case No.812/2012 in the Chief Magistrate's court at Machakos – Mrs M.W. Murage – (cm) on 9/10/2012)

JOSEPH NJOROGE WANJIRU ……..APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

JUDGMENT

*The appellant herein **Joseph Njoroge Wanjiru** was convicted of an offence of Robbery with Violence contrary to Section 296(2) of the Penal Code.*

The particulars of the offence were that on the 21st day of April, 2012 at Sabaki Estate along Mombasa-Nairobi Highway, in Athi-River District within Machakos County, jointly with others not before court while armed with dangerous weapons namely knives robbed **John Muritu Mwangi** of a motor-cycle registration number **KMC T467R** make Boxer Bajaj, mobile phone make Nokia C9 and cash money **Kshs.5,890/-** all valued at **Kshs.97,890/-** and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **John Muritu Mwangi.**

The prosecution case was that on 21/4/2012, the complainant herein (PW1) who is a motorcycle rider was hired by a passenger to take him to Sabaki from Mlolongo for cost of 200/-. While on the way, the passenger asked PW1 for his mobile phone and he called somebody. The passenger also asked PW1 to ride slowly as he was feeling cold. Then suddenly a motorcycle emerged from behind and rode ahead of PW1. It blocked PW1 and it had three people. That there were many motor vehicles on the road and PW1 was able to see the accused person (now appellant). Also the lights for both motor cycles were on. That accused person (appellant) had a knife. Then they held PW1 and threw him into a ditch and rode off with the complainant's motor cycle. PW1 took the number of the attacker's motorcycle which was **KMCU 772A**, red in colour. That in the process of the robbery, they took **Kshs.5.890/-** belonging to PW1 and his mobile phone.

On 23/4/2012, complainant went to Safaricom to check on numbers called by his line on 21/4/2012 at the time of robbery. PW1 obtained the print-out and noted the last number called was 0721951272. PW1 called that number and the owner led him to where he was. PW1 approached the said person with a police officer from Kamukunji Police Station. PW1 recognized the accused person (appellant) because he saw him at the time of robbery. Appellant was the one who was riding the motor cycle that blocked PW1.

The appellant gave his sworn Defence and called no witness. He told the court that somebody had called him enquiring where he was. He gave the caller directions to where he was. Then complainant appeared with the Police and the appellant was arrested. He denied any knowledge of the said robbery. However the trial magistrate found his defence a mere denial and rejected it. The trial court found that the prosecution had proved case beyond reasonable doubt and convicted him. He was sentenced to death as prescribed by the law.

The appellant dissatisfied with the said conviction and sentence filed this appeal and relied on numerous grounds. These g rounds are:-

i. ***That learned trial magistrate erred in fact and law in failing to consider the defence evidence given by the appellant terming it a mere denial.***

ii. ***The learned trial magistrate erred in fact and in law in failing to consider the evidence given by the other five prosecution witnesses which evidence was contradictory.***

iii. ***The learned trial magistrate erred in fact and in law in failing to consider that the accused person never used force/violence against the complainant and was wrongly sentenced to death.***

iv. ***That the learned trial magistrate erred in fact and in law for failing to consider the accused persons mitigation while delivering her sentence.***

Miss Mwangi for the Appellant argued the appeal and submitted that the issue of identification that the trial magistrate relied on was doubtful. That the available evidence was not sufficient to convict the Appellant and therefore conviction herein was unsustainable. The Appellant's counsel further submitted that the conviction was against the weight of evidence. She relied on various authorities to support her submissions.

Ms Gakobo, the learned state counsel, opposed the appeal on behalf of the State. She submitted that the evidence on record was more than just suspicion. She further argued that identification was clear as the condition existing at the time of robbery were favorable for PW1 to see his attackers well. PW1 saw the appellant well enough and identified him later. That the evidence was consistent and appellant was safely convicted and the trial magistrate never shifted the burden of proof to the appellant.

We have analyzed and re-evaluated the evidence afresh in line with **Odhiambo Vs Republic Cr. Appeal No. 280 of 2004 (2005) 1KLR** where the Court of appeal held that:-

> ***"On the first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and re-assess 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 demeanor."***

In our own analysis of the evidence, four issues emerged for determination. These are:-

i. ***Whether the identification of the appellant was sound enough to form the basis of conviction.***

ii. ***Whether conviction was against the weight of evidence.***

iii. ***Whether the trial magistrate shifted the burden of proof to the appellant.***

iv. ***Whether the magistrate relied on evidence of suspicion to convict the appellant***.

We will first deal with the issue of identification. In considering the evidence of identification, we relied in the Court of Appeal decision in the case of **Joseph Ngumbau Nzalo Vs Republic (1991) 2 KAR page 212** where the court states that:-

"A careful direction regarding the conditions prevailing at the time of identification and the length of time of which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential."

We also referred to the case of **Wamunga Vs Republic Cr. Appeal No. 20 of 1989 (1989) 1KLR page 424** where the Court of Appeal held that

"Where the only evidence against a defendant is evidence of identification on recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from possibility of error before court can safely make it a basis of a conviction."

Miss Mwangi for the appellant submitted that from the available evidence, it was not possible to make a positive identification. She further submitted that PW1 merely told the court that he identified the appellant as the person he had seen on the night of robbery. That PW1 did not state how he identified the appellant as he had not given his description to the police during the first report. She relied on the case of **Musyoki Ndothani Vs Republic Cr. Appeal No. (2006) eKLR** where the court relied in the case of **Telekali & Another Vs Republic 1952 (EA)** and stated that:

"Evidence of first report of the complainant to a person in authority is important as it often provides good test by which the truth and accuracy of subsequent statement may be granted and provides a safeguard against later embelishment and make-up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others."

Miss Mwangi for the appellant further submitted that the trial magistrate did not analyse well the evidence given by PW1 on identification and that caused grave error. She submitted that PW1 did not give the descriptions of the appellant to the police in the first report. On page 20 of the proceedings, PW6 during cross examination stated:-

"I recorded statement that night. I have not recorded number of the motor cycles."

Though PW1 stated in his testimony in court on page 7 of the

proceedings. ***"I read the number of their motorcycle KMCV***

772A" .....he did not record that in his first report. Why?

Guided by the findings in **Telekani & Another Vs Republic (Supra)** that ***"evidence of first report by the complainant to a person in authority is important'',*** we are doubtful whether on the night of the said robbery; PW1 really noted the registration number of the said motor cycle. This court concurs with the appellant's counsel submissions, that the issue of identification of the motorcycle was not clear.

Further in his testimony, PW1 told the court that on the night of the robbery, he saw the appellant well as he was riding the motorcycle that blocked him. In cross examination PW1 said:-

"You faced the direction of the on-coming motor vehicles and I saw you well. There was light. You had a knife."

The trial magistrate believed that evidence of PW1 and stated in the findings that ***"PW1 was able to see the number of the motor cycle which accused had and he gave the number to the police while recording his statement''.*** However as we found earlier, the complainant did not give details of the motorcycle or description of the appellant in his first report.

We find that the trial magistrate relied on the alleged visual identification without warning herself of the danger of relying on a single identification witness. In the case of **Cleophas Otieno Wamunga Vs**

Republic Cr. Appeal No. 20 of 1982 the Court of Appeal warned as follows:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize the danger. Whether the case against the Respondent depends wholly and to a great extent on the correctness of one and more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need to caution on the correctness of the identification".***

M/s Gakobo submitted that identification of the appellant by PW I was clear as his motor cycle was blocked by the motor cycle ridden by the appellant. That PW I saw the appellant well as the lights for the two motor cycles were on and he saw the details of the motor cycle ridden by appellant and the appellant as well. However, we found that PW I did not tell the court how long the lights of the motor vehicles and motor cycles were on and how long he saw the Appellant to enable him identify him well. The court should have taken careful consideration of the prevailing conditions at the time of such identification and the length of time the complainant had observed the Appellant herein (see) **Joseph Ngumbau Nzalo Vs R (**Supra).

Having carefully analyzed the available evidence, we find that the circumstances of identification were unfavorable for positive identification. The period under which the complainant (PW I) said he saw the appellant was very brief and insufficient for safe and positive identification.

The 2nd issue for determination was whether the conviction was against the weight of evidence. Miss Mwangi for the appellant submitted that the trial Magistrate relied on the fact that PW I alleged that he gave his phone to the passenger that he carried and he said passenger called another person. After a short while the motor cycle that had robbers emerged and PW I was robbed. That PW I got a print out from Safaricom and called the last number that was called before the robbery. It was traced to the appellant. Miss Mwangi submitted that the presence of appellant's number on the call list could be explained in any way. It could have been guess work and the person could have known the appellant's number.

We found that the appellant did not admit that he was ever called by any person at the stated time. It was possible that after the robbery the complainant number could have been used to call other persons including the appellant herein. We find that relying on the last number called by PW I phone was not safe as that was not free from any other explanation. That any other explanation was sufficient to raise doubt in the mind of that court. This court therefore finds that the conviction herein was against the weighty of the evidence adduced.

The 3rd issue is for determination is whether the trial magistrate shifted the burden of proof to the appellant. It is the trite law that the burden of proof always rests with the prosecution. We find that on page 28 of the Judgment, the trial magistrate stated that :-

> " ***His defence is a mere denial and does not challenge the prosecution case. He did not give an account of himself on the day the robbery occurred".***

The appellant had no obligation to give an account of himself on the date of robbery as the burden of proof is always on the prosecution. The applicant could have even opted to keep quiet**.** We find that indeed the trial magistrate shifted the burden of proof to the appellant.

Having analyzed the available evidence, we find that the appellant herein was convicted on mere suspicion because his telephone number was the last one called by PW1 telephone number on the date of robbery. However, we stated that such calls could be explained in different ways. Suspicion, no matter how strong, is not a basis for conviction. In the case of **Republic Vs Geoffrey Thiong'o Wangui Criminal case No. 62/2003** in Nyeri High Court, Justice Okwengu held that:-

> ***" It is evident that the case against accused person is based on nothing more than pure suspicion. That is not sufficient to establish prima facie case against the accused***".

Also in the case of ***Sawe Vs Republic (2003) KLR 364*** *the Court held that:-*

"Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt".

Having carefully considered this appeal and re-evaluated the evidence, we find that the evidence could not sustain the offence charged. We find merit in this appeal, quash the conviction and set aside the sentence .We order the release of appellant forthwith unless he is otherwise lawfully held.

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B T JADEN **L.N. GACHERU**

JUDGE **JUDGE**

DATED and DELIVERED at MACHAKOS this 21st day of January 2014.

…….

B T JADEN

JUDGE