REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HIGH COURT CR. APPEAL NO. 84 OF 2013

[From the Original Conviction and Sentence in Criminal Case No. 130 of 2006, in the Principal Magistrate's Court at Makindu – Mr. B Ochieng (PM) 18th September, 2007].

COSMAS MATEE KINYANZII.....APPELLANT

VERUS

REPUBLIC.....RESPOPNDENT

JUDGEMENT

1. The appellant herein **Cosmas Matee Kinyanzii** was tried and convicted for an offence of **Robbery** with **Violence** contrary to **Section 296(2)** of the ***Penal Code.***

2. The particulars of the offence were that on the 18th day of January, 2006 at about 11.00 pm at Thange area along Mombasa/Nairobi Highway in Makueni District within the Eastern province jointly with others not before court while armed with dangerous weapons namely pangas and arrows,robbed ***Jeremiah Kimaru Gachanga*** of cash **Kshs. 10,000/=** , *one bag containing clothes , hospital documents, one torch, one jacket, pen knife, driving licence and one mobile phone make Motorolla T 190 all valued at Kshs. 23,800/= and at or immediately before or immediately after the time of such robbery wounded the said* ***Jeremiah Kimaru Gachanja.***

3. The Appellant filed the appeal based on the six grounds of appeal and the Amended grounds of appeal submitted to the Court on the date of hearing this appeal. The Appellant also relied entirely on the written submissions.

4. Among the grounds of appeal are that; the trail Magistrate erred both in law and fact in convicting the appellant relying on circumstantial evidence which remained shaky and contravened **Section 67** of the **Evidence Act.** That the charges were not adequately proved and the trial magistrate was wrong in rejecting his Defence. Further that the trial Magistrate erred in law by failing to accord him an opportunity to cross examine PW1 which was against the fundamental rights.

5. Miss Maingi, the learned State Counsel opposed the appeal on behalf of the state. She contended that there was sufficient circumstantial evidence to convict the Appellant. She supported both the conviction and the sentence and urged the court to dismiss this appeal.

6. We have now analysed and re –evaluated the evidence afresh in line with **Odhiambo Vs Republic Criminal Appeal No. 280** of **2004 (2005) 1 KLR** , where the Court of Appeal held that;

"On a first appeal, the court is mandated to look at the evidence adduced before the trial court 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".

7. **PW1 (Jeremiah Kamau Macharia,** the complainant who was the driver of the motor vehicle **KAP 194 X** a semi trailer testified that on the night of *18/6/2006,* he was in company of his turn boy one Mbovu. They were travelling from Nairobi to Mombasa along the Mombasa- Nairobi Highway. That on arrival at **Thange** area as they approached a bump at a very low speed, they were attacked by a gang of about 8 armed persons. The thugs were armed with pangas and rungus. That the thugs jumped into the slow moving trailer and severed the brake cable from the driver's cabin and the trailer stopped.

8. Then the thugs broke the door windows on the driver's cabin and opened both the driver's and passenger's doors. PW1 was hit on the face and left hand and was pulled out of the motor vehicle. His turn-boy also met the same fate and PW1 was then robbed him of the items listed in the particulars of the charge.

That the thugs ran away after he disarmed one of them.They managed to repair the motor vehicle and proceeded to *Mtito Andei Police Station*, where police assisted him to Makindu hospital where he was treated and discharged.Meanwhile he reported the matter to Kibwezi Police Station.His turn –boy who had escaped into the bush reappeared after motorists stopped to assist them.His P3 form was filled.Later he learnt that a suspect had been arrested in connection with the robbery.

9.Other witnesses testified in support of the prosecution.The prosecution in total called six witnesses.The Appellant gave unsworn Defence and called no witness.Appellant denied the charge and alleged that he sustained the injury to his leg following a bicycle accident as he was returning back home from fetching water on a bicycle.He further alleged that he did not go to hospital for treatment since he preferred traditional herbs which he was using to treat the wound.

10.The trial Magistrate considered the evidence and rejected the Defence by appellant as unconvincing.The trial Magistrate relied on ***Circumstantial Evidence***.The Trial Magistrate rejected the Appellant's Defence on the grounds that; when the appellant was arrested the wound was still fresh which was consistent with the fact that it was inflicted less than 12 hours earlier, that the nature of injury i.e. Pierced wound (2.5 cm deep) suggested that he was pierced by a sharp object such as an arrow; that it was the only injury he suffered which was inconsistent with a fall from a bicycle; finally the sample of the accusedperson's blood when compared with the blood on the arrow head matched each other blood group **'O'.**He was also arrested at Thange area within the vicinity of the robbery.

11.From the facts of the case, it is clear that the trial Magistrate relied on circumstantial evidence.The issue of identification was out of question as PW1 did not testify that he could identify any of his attackers.

12.From the available evidence, there is no doubt that an offence of Robbery with Violence contrary to section 296(2) of the Penal Code had been committed and was proved.The Court of Appeal in the case **of Johanna Ndungu Vs Republic in Appeal No 116 of 2005** (unreported) set out what constitutes robbery with violence.

" ....in the three sets of circumstances prescribed under Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub Section .

i. ***If the offender is armed with any dangerous or offensive weapon or instrument.***
ii. ***If he is in the company of one or more other person or persons or***
iii. ***If at or immediately before or immediately after the time of the robbery he wounds, beats strikes or using any other violence to any person".***

13.From the above analyses and considering the evidence on record, there is no doubt that an offence of robbery with violence was meted on PW1. PW1 stated that he was attacked by a group of about eight (8) armed persons. They broke into the door windows of the trailer.He was injured on the face and left hand. He was also robbed of the items stated in the particulars of the charge sheet.PW1 was treated at Makindu Sub District hospital. He was treated by PW6 a Medical Officerbased atMakindu sub district hospital, who produced his P3 form. The trial magistrate was correct in finding that an offence of robbery with violence had been committed.

14.The issue now for determination is whether there was sufficient circumstantial evidence to convict the appellant.Courts in Kenya have severally relied on circumstantial evidence but to arrive at their findings the same has to be thoroughly examined as it is the kind of evidence that can be fabricated to cast suspicion.

15.The case of **Sawe Vs Republic Criminal, Appeal No. 2 of 2002,** clearly defined the legal requirements of circumstantial evidence.The court held that:-

" In order to justify on circumstantial evidence ,the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence can be basis of conviction only if there is no existing circumstances weakening the claim of circumstances relied on".

16.In the first ground of Appeal and submissions the Appellant challenged the trial Magistrate reliance on circumstantial evidence to convict him. We have considered the trial Magistrates' finding on Page 6.He stated that:-

" The only evidence implicating the accused person with the offence is circumstantial"

In the case of **Republic Vs Mdoe Gwede Cr. Case No. 12 /2003** at High Court, Mombasa, Justice Maraga (as he then was) stated that:-

"It *is necessary before drawing inference of the accused guilt from circumstantial evidence to be sure that there are no other co existing circumstances which would weaken or destroy the inference. To justify a conviction on circumstantial evidence, however, the facts and surrounding circumstances must irresistibly point to the guilt of the accused person".*

17.For this court to make an inference on whether the available circumstantial evidence would justify a conviction we need to re-evaluate the available evidence. In his findings, the trial Magistrate found that the appellant had a deeppenetrating wound on his right knee.The trial Magistrate concluded that this injury was inflicted by the rescuers who went to the rescue of PW1 during the robbery. It was also the finding of the trial Magistrate that the rescuers shot arrows at the attackers and one of the attackers exclaimed in pain, apparently having been hit, before the gang melted into the darkness.

18.The Appellant submitted that the above evidence was stage managed by the trial Magistrate so that he could find reason to convict him.We have indeed re-evaluated the evidence. From the evidence of PW1, there is no indication that he ever stated that there were rescuers who went to the scene. This court has re-evaluated the original record and noted that,in his testimony, PW1 told the court that the thugs fled after he disarmed one of them.PW1 did not testify that he was ever assisted by any rescuers.

19.Upon re- evaluation of the evidence and thorough examination of the findings of the trial magistrate, the court finds that the Magistrate alluded to the fact that the rescuers shot arrows at the attackers and one of the attacker exclaimed in pain having been shot and "**that is when the gang melted into darkness".** This Court finds that the above evidence is not recorded in the typed proceedings nor in original record.We agree with the appellant that the evidence on the issue of rescuers having shot one attacker was from the trial Magistrate but not the witness, PW1.

20.Further, the trial Magistrate made an inference that the rescuers could not be called as witnesses

because they feared reprisals from the attackers who were allegedly from Thange area.The Appellant attacked that evidence and submitted that the trial Magistrate stage managed or invented that bit of evidence. With due respect to the trial Magistrate, this court entirely agrees with the appellant submissions, on that aspect. Having re-evaluated the entire record, the court finds that evidence missing and the court is left wondering where the trial magistrate obtained it from.

21.Having found that the issue of rescuers is in doubt, this court would find it difficult to hold that any of the attackers was shot with arrows by the members of public (rescuers) since PW1 did not testify to that effect. Even if the attackers had been shot with arrows and a blood stained arrow head was found at the scene asper the evidence of PW2 , is there sufficient circumstantial evidence to link the appellant to that blood stained arrow head?.

22.PW5 testifies that he received a tip off and proceeded to the house of the appellant where he found him with a deep penetrating wound on his left knee which he was unable to explain and that led to his arrest. However, the appellant explained inhis defence that he got injured following a bicycle accident and that he did not seek medical treatment but was using herbs to treat it. PW5 did not search the appellant's house and nothing was recovered to link him to the Robbery. The trial Magistrate found the Defence unconvincing on three grounds; that the wound was still fresh; the nature of injury and blood sample matched that of the Appellant.

23.This Court is of the view that the trial Magistrate's findings that the injury on the appellant could not have been inflicted by a bicycle accident was wrong.If a sharp object from the bicycle inflicted injury on the appellant, then he would have received an injury inflicted by a sharp object as stated in the P3 form .

24.PW3 further stated that as the investigating officer, he took a blood sample of the appellant to the government chemist together with the blood stained arrow head.That the blood stains on the arrow head matched the blood group of the appellant ***'blood group* 'O'.**That analysis was allegedly done by one Dr Stephen.The said Dr. Stephen was not availed in court as a witness and prosecution did not explain the reasons for his unavailabilityThis was a material witness and his absence meant that the appellant was denied an opportunity to cross examine him on the veracity and content of his report.. Why was he not called?. It is trite law that when the prosecution fail to call a material witness they do so at their own risk. The Court held in **NG'ANG'A Vs REPUBLIC (1981) KLR 483** that:-

" an adverse inference will be drawn that the evidence of that material witness, if called would be adverse to the prosecution"

25.This court has considered the report from the government analyst.The report states that the suspect blood group was **"O"** and arrow head was stained with human blood group **"O".**However, the said report is sketchy and lacks details.Itdoes not state whether the blood group was either **"O"** positive or **"O"** negative and how the analyst was able to arrive at the finding that the blood stains could have come from the suspect after the injury.There was no evidence that any of the attackers was injured by anyone.

26.The Court finds that the circumstantial evidence relied on by the trial Magistrate was weak and was not free from any other explanation. The existing circumstantial evidence cannot draw an inference of the appellant's guilt.

27.On grounds no five; the appellant alleged that he was not allowed to cross-examine PW1 after he had adduced his evidence. The court has examined the typed proceedings and the original record.It is indeed true from the typed proceedings that there is no indication that appellant was given a chance to cross – examine the complainant.However, from the original record, it is evident that after PW1 gave his evidence,the court allowed appellant to cross examine him. The proceedings shows that appellant had nothing to ask PW1 .There is also no evidence that appellant ever asked the court to be allowed to have PW1 recalled for cross-examine and the court rejected his application.The court finds that ground far-fetched.

29.There is another issue that this court has noted after evaluation of the evidence.In the Charge Sheet,

the complainant is given as one ***Jeremiah Kimaru Gachanja*** .However, the court record shows that the person who gave evidence as PW1 was one **Jeremiah Kamau Macharia.** The question that this court would pose to ask; is ***Jeremiah Kimaru Gachanja*** the same as ***Jeremiah Kamau Macharia PW1 herein?.***

30.In the absence of any explanation, this court finds the complainant who gave evidence is different from the complainant who is stated in the particulars of the charge sheet.That disparity goes to the root of this case.

31.After a careful analysis and re-evaluation of the evidence on record, the Court finds that the trial Magistrate relied on shaky circumstantial evidence to convict the appellant herein. The conviction was therefore not safe. The court allows the appeal, quashes the conviction and set aside the sentence imposed by the trial Magistrate's Court. The Appellate is now at liberty unless lawfully held.

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

JUDGE **JUDGE**

Dated and delivered this 21st day of January 2014.

B . T. JADEN