REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 249 OF 2011

(***From the Original Conviction and Sentence in Criminal Case No. 964/2010 in the Principal Magistrate Court at Kitui in A.G. Kibiru (PM) on 15/12/2011***)

JEREMIAH M MWANGANGI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT.

1. The Appellant herein **Jeremiah Musyoki Mwangangi** was tried and convicted on offence of *Robbery* with *Violence contrary to Section 296(2) of the Penal Code*.

2. The particulars of the offence were that on the 21st day of December, 2010 at Kwa-Vonza Location in Kitui District within Eatern province jointly with another while armed with offence weapon namely a knife and manila rope robbed Fredrick Otieno Nyangombe of cash ***Ksh.150/-, one mobile phone make Nokia and a pair of shoes all valued at Ksh.5350/-*** and immediately before or immediately after the time of such robbery used actual violence to the said **Fredrick Otieno Nyangombe.**

3. The Prosecution case was that on 21st December, 2010, the complainant herein who is a taxi driver was hired by the appellant herein to take him to SEUCO University at a cost of Ksh.1,200/-. Before proceeding to Kwavonza,, the appellant requested him to pick another person at Kathumo Supermarket. After picking the said person who was the second accused person that was acquitted by the trial court, they proceeded to Kwa-Vonza. At the gate of the University, the appellant who had sat at the back held a rope aroundthe neck of the complainant.

4. The appellant had a suitcase which he put in the boot of the complainant's motor vehicle KBM 523X then the appellant and the other person asked the complainant to move out of the motor vehicle. They led him to the bush where they robbed him of his mobile phone, Nokia, Ksh.150/- and a pair of shoes. The other person threatened to stab the complainant. The complainant grabbed the knife and started to scream. When the appellant and the other saw the torches shone by the neighbours they ran away.

5. Thereafter the complainant reported the matter to Kitui Police Station and handed over the knife, nylon rope and the briefcase left behind by his attackers to the police. Inside the brief case, there for a

wallet, mobile phone, Nokia Blue/Black in colour and a National Identity Card No. 2271977 in the name of Mwangagi Munywoki.

6. That the following day police informed him some suspects had been arrested. The complainant went to Kitui Police Station and attended an identification parade where he identified the appellant herein and the other. That he had seen both his attackers well. The Appellant had hired his motor vehicle and he was still in the dark suit that he wore during the robbery.

7. The complainant alleged that he was injured on the neck and right hand during the incident and he was treated at Kitui District Hospital where PW 2 filled his P3 form. PW 3 conducted the identification parade and PW 4 was the investigating officer who received a report of robbery from the complainant.

8. The Appellant had entered a plea of not guilty but did not participate in the trial as he declined to do so. The 2nd accused person was acquitted by the trial court after the close of the defence.

9. The appellant herein was dissatisfied with the findings of the trial magistrate and filed this appeal relying on numerous grounds. These grounds are: -

1. ***That, the learned trial magistrate gravely erred in both points of law and facts when he convicted him in this case while relying on the evidence adduced by the complainant PW1 without him not considering that the same was a case of mistaken identity.***

2. ***That, the learned trial magistrate gravely erred in both points of law and facts when he convicted him in this case while relying on the circumstantial evidence.***

3. ***That, the learned trial magistrate gravely erred in both points of law and facts when he convicted him in this case without questioning his mode of arrest.***

4. That, the learned trial magistrate gravely erred in both points of law and facts when he convicted him in this case while prejudicing the appellant when he denied all his applications that he made before the court and thus remained unfair trial.

5. ***That still, the learned trial magistrate gravely erred in both points of law and facts when he convicted him in this case while not complying with any section in his ruling that the appellant refused to attend the trial.***

10. The issue for determination is whether evidence adduced by the prosecution was sufficient to prove the guilt of the appellant herein. The other question is whether there was miscarriage of justice when the trial magistrate allowed the trial to go on in the absence of the appellant herein.

11. This being the first appeal, our duty as a first Appellate court are well stated in the case of **Njoroge Vs Republic (1987) KLR 19** and also the case of **Odhiambo Vs Republic Cr. Appeal No. 280 of 2004 (2005) KLR** 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 reassess 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".***

12. We therefore have a duty to reconsider the entire evidence adduced before the trial court and arrive at our conclusion on whether the verdict reached by the trial court should be upheld. We have cautioned ourselves that we neither saw nor heard the witnesses as they testified and we do not make due allowance on that.

13. From the available evidence, the complainant told the court that he was attacked by two persons. One tied a rope around his neck and the other threatened him with a knife. In the process of the said

attack, he was robbed of Ksh.150/-, mobile phone and a pair of shoes. He was also injured when he snatched the knife from one of his attackers. The complainant was therefore violently robbed.

14. In the case of **Johanna Ndungu Vs Republic in Appeal No. 116 of 2005** (unreported) vividly set out what constitutes an offence of robbery with violence. It was stated: -

"……..The three sets of circumstances prescribed in Section 296(2) which we give below and any 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 uses any other violence to any person".***

15. Analyzing the evidence adduced by the complainant, we are satisfied that an offence of robbery with violence was visited on the complainant herein.

16. The appellant submitted that he was convicted on the evidence of single identifying witness. That the said evidence was not proven beyond a reasonable doubt. He relied on various authorities. The Appellant specifically relied on the case of **Peter Wekesa & Others Vs Republic HCC App. No. 114 of 1995** where it was held that: -

"Mistakes are often made and many witnesses at a time cannot even be able to properly identify another person even in broad day light".

17. In the instant case, we noted that the complainant went to Kitui Police Station on 21st December, 2010 and reported a case of robbery. PW I told the court that they went to Kwa-Vonza but did not find the attackers. However, the next day: -

"He was woken by an officer who told him that some suspects had been arrested and he should go and see if he can identify them".

18. Further, PW 4 told the court,

"The following morning Accused I (now appellant) came to the Police Station claiming he had been robbed by a taxi driver"

It is evident that the Appellant herein was not arrested on instigation of the complainant but he took himself to the police station and reported that he had been robbed.

19. It was only after the Appellant was arrested that Police called the complainant who allegedly identified the appellant in an identification parade. The complainant told the court that: -

*"**Accused I (now appellant) was dressed in the same clothes. I was able to identify his face clearly as I had seen him when he came to get the taxi at the Caltex Petrol Station. He was in a black suit"***

20. The complainant had also told the court that it was around 6.00 p.m. when the Appellant hired the taxi. He therefore saw him well enough to identify him. In considering the evidence of identification we are guided by the court of Appeal in its decision in the case of **Joseph Ngumbau Nzalo Vs Republic (1991) 2KAR page 212** where the court held that: -

"A careful direction regarding the conditions prevailing at the time of identification and the length of time of which the witness held the accused person under observation, together with the need

to exclude the possibility of error was essential"

21. Analysing the available evidence we find that the complainant was hired by appellant and 6.00 p.m. It was during the day and he saw him well. The conditions prevailing at the time were both conducive and positive for identification. Such was the finding in the case of **Wamunga Vs Republic Cr. Appeal No. 20 of 1989 (1989) KLR page 424**, where the Court of Appeal held that:

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

22. The trial magistrate was, therefore in order when he believed the complainants evidence on identification of the appellant and based that the convict him. The complainant had alleged that the appellant had a brief case which he left in the boot of the complainant's motor vehicle. In his submissions, the **appellant** had admitted this fact. In the brief case there was an identification card? allegedly belonging to appellant's father which the appellant has admitted in his written submissions.

We are relying on the case of **Roria Vs. Republic (1967) E.A 583 at Page 584** to come to a conclusion that such evidence corroborated the evidence of identification. It was thus held.

> ***"....in such circumstances what is needed is the evidence, whether it be circumstantial on direct pointing to the guilt from which a judge or jury can reasonable conclude that the evidence of identification although based on testimony of a single witness can safely be accepted as free from the possibility of error."***

23. We have properly tested the evidence of visual identification in this case and we have ruled out any possibility of error or mistake. We find that the court properly analyzed the evidence and arrived at the right conclusion. We come to a conclusion that the evidence available as adduced by the prosecution was sufficient to prove the guilt of the appellant herein.

24. The last issue for determination is whether there was miscarriage of justice for the trial to proceed in the absence of the appellant. We have analyzed the proceedings and noted that indeed on 23/3/2011, the appellant herein had lodged an application in court. He stated as follows:-

"I am not ready to proceed with this matter as the court jailed me in another case."

The trial magistrate made a ruling and found that:-

"The reasons given by accused 1 (appellant) where he is not ready to proceed is baseless. He admits he was jailed by Court 2."

Trial court then after declining to transfer the matter to another court set the matter down for hearing on 5/5/2011.

25. The Appellant appeared in court on 5/5/2011 and when the complainant took the witness stand, the appellant informed the court that he did not wish to proceed.

"Accused 1 – I do not want to proceed"

Then trial magistrate proceeded to note in the proceedings that:-

"Court – Accused I has opted not to attend court for hearing. Matter to proceed in his absence."

26. We have considered the provisions of Article 50(2)(f) of the Constitution which provides that:-

"Every accused person has the right to a fair trial which includes the right to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed."

In our view it is obvious from the court record that the Appellant chose to stay away from the proceedings and therefore made it impossible for the trial to proceed in his presence. We are of the view that there was no miscarriage of justice and the trial magistrate acted within the purview of Article 50(2) (f) of the Constitution.

27. After a careful analysis and evaluation of the evidence on record, we are satisfied that the trial magistrate properly convicted the appellant herein and the conviction was based on sound evidence.

28. We confirm the conviction and sentence imposed on the appellant by the trial magistrate and dismiss the appeal.

It is so ordered.

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

JUDGE **JUDGE**

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

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B . T. JADEN

JUDGE