REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 140 OF 2012

JOHN MUSHETE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein was charged before the lower court with the offence of robbery with violence contrary to section 295 as read together with section 296 of the Penal Code *(Cap. 63 Laws of Kenya).* The particulars thereof were that on the 20th day of April 2012 at Maralal Township within Samburu County jointly with another person not before the court, while armed with dangerous weapons namely a sword and an axe, robbed John Ngwiri Maina of Kshs 4,800 cash, 2 mobile phones make Nokia 2600 and Nokia 6300 both valued at at Kshs. 11,000/= and at or immediately before or after the time of such robbery used actual violence against the said persons. He was on the evidence convicted and sentenced to death.

2. Aggrieved by the finding of the lower court, the Appellant herein appealed against both conviction and sentence by Petition of Appeal dated 5th July 2012 and has further put in written submissions, which we have duly considered. The grounds upon which the appeal is premised may be summarized as follows-

(a) that the evidence produced before the lower court was insufficient and contradictory,

(b) that the evidence on identification was full of errors,

(c) that there was no independent evidence to displace the appellant's alibi defence,

(d) that none of the stolen items were found in his possession,

3. The appeal was opposed by the State. Mr. Marete, Prosecution Counsel submitted that this was a case of recognition as the complainant had known the Appellant for about 5 years. Although the attack took place at around 9.00pm the lighting was good and the complainant was able to identify the Appellant. In addition his evidence was corroborated by PW3 who was also attacked by the Appellant and his accomplice. It was therefore his submission that the conviction by the lower court was safe and sentencing was per the law.

4. This being a first appeal this court has the duty to re-appraise the evidence, subject it to exhaustive examination and reach its own independent findings. It should however remind itself that the trial court had the benefit of hearing the witnesses testify and therefore it was best equipped to assess their

credibility. It should therefore not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (see **Republic vs. Oyier [1985] KLR 353).**

5. The prosecution's case was that on 20/04/2012 at around 9.00pm, PW1, John Ngwiri Maina, was on his way home when he encountered 2 men at a place known as Darwin Building. They blocked his way and ordered him to sit down. The place was lit by security lights from the nearby buildings and he saw the men as they approached him. He was able to recognize the Appellant as he had known him for about 5 years although he did not know his name. The Appellant was armed with an axe and a rungu while his accomplice was wielding a panga and a piece of metal. PW1 did not comply and attempted to run away while screaming for help. The assailants however pursued him and caught up with him near the Darwin Building. PW1 was pushed to the ground and the Appellant placed an axe on his neck. They robbed him of his 2 phones and cash. PW1 managed to escape when the assailants left him to attack some men who were passing by.

6. PW1 was cut on the right hand and also sustained an injury on his left knee when he fell down which injuries were confirmed by PW2, the medical officer who examined him and filled in the P3 Form (exhibit 1). He classified the injury as harm and found that the same had been inflicted using a sharp and blunt weapons. PW1 thereafter reported the matter at Maralal Police Station. The Appellant was arrested on 5th May 2012 at the bus station after being pointed out by PW1 as one of the assailants. None of the stolen items was recovered.

7. PW3 was Kennedy Meli. It was his testimony that on the night in question, at about 9.30 pm, he was going to his home at Chang'aa Estate with his friend Mwangi. On reaching near Pentagon Bar, they were attacked by 2 men . PW3 was hit on the shoulder with a rungu while his friend Mwangi was hit on the neck. He recognized the Appellant as one of the attackers and talked to him. The Appellant also recognized PW3 and told him that he had not realized that it was PW3 and further asked him not to tell anyone of the incident. Nothing was stolen from PW3 or his friend Mwangi.

8. PW3 and his friend found PW1 lying on the ground about 20 meters from where they had been attacked. The three then went to Maralal Police Station where they reported the matter

9. PW4, No. 67616 PC Kalamon Kukuton was the investigating officer. He confirmed having gone to the scene of the assault and stated that he saw signs of a struggle. He confirmed that nothing was found on the Appellant upon his arrest.

10. Upon considering the evidence, the trial court found that the prosecution had established a prima facie case and put the accused person on his defence. The Appellant gave an unsworn statement and did not call any witnesses. He denied having committed the offence with which he had been charged and stated that he had been out of town from 10/4/2012 till 5/5/2012 when he was arrested.

11. We have evaluated the entire evidence produced and find that the prosecution was able to establish that on 20/04/2012 at about 9.00pm, the complainant, PW1 was attacked by 2 men who were armed with dangerous weapons namely a rungu, panga and axe and robbed of his 2 cellphones and Kshs. 4,800 cash. Violence was used during the robbery and the complainant sustained the injuries as set out in the P3 Form. Consequently all the ingredients of the offence of robbery with violence under section 296 (2) of the Penal Code were satisfied.

12. The issue that follows, and which is central to this appeal, is whether the prosecution established that the Appellant was one of the attackers who robbed PW1 on the fateful night. PW1 testified that he was able to identify the Appellant as one of the attackers as he had known him for about 5 years prior to the night he was attacked although he did not know his name. PW3 who also placed the Appellant at the scene of the assault stated that he knew the Appellant having seen him around town and would greet him when they met.

13. Their testimony was more of recognition than identification. Thus, this being a case of

recognition, it lends a greater measure of confidence that the appellant was one of the robbers. The difference in approach between identification and recognition was expressed thus by Madan J.A in **ANJONONI AND OTHERS VS. THE REPUBLIC [1980]KLR 59-**

> *"This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"*

14. Nevertheless the court should still treat such evidence with caution and satisfy itself that the same is water-tight and free of error. **This was emphasized by the Court of Appeal in OMBINA VS. REPUBLIC Criminal Appeal NO. 24 of 2000 which was cited with approval in KARANJA & ANOTHER VS. REPUBLIC [2004] 2 KLR 141 where it held as follows-**

> ***"The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage occurring can be reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness was made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger, but even when the 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."***

15. The circumstances under which the identification was made and which ought to be examined by the court were stated in the English case of Republic V. Turnbull [1976] 3 ALL E.R. 549-

"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the Police by the witness when first seen by them and his actual appearance?"

16. It was the testimony of PW1 and PW3 that they were able to observe the faces of their attackers using the light from the nearby buildings. The scene of PW1's attack was lit by security lights while that of PW3 had been lit by a fluorescent light. It was however contended by the Appellant that the trial court did not inquire on the intensity of the light as well as the distance of its source from the scene of the attack.

17. We agree that the trial court should have inquired into these circumstances in order to satisfy itself on the correctness of the identification and erred in failing to do so. However we have examined the evidence herein and find that this failure was not fatal to the conviction. PW1 testified that he saw the faces of the 2 men as they approached him from about 100 metres away and recognized the Appellant. He also testified that the Appellant was armed with an axe and rungu and he is the one who ordered him to shut up and further placed the axe on his neck. His testimony was corroborated by PW3 who also placed the Appellant at the scene where PW1 was attacked. It was his testimony that he recognized the Appellant as one of the men who attacked him and his friend Mwangi and even talked to him. When the Appellant recognized PW3 he let him and his friend go and asked them not to tell anyone of the incident.

18. The Appellant however contended that there was a material discrepancy between the evidence of PW1 and PW3 on what transpired after PW3 and his friends had been robbed. PW1 testified that he escaped while PW3 and his friend were being robbed while PW3's testimony was that they found PW1 lying on the ground, helped him up and the three reported the matter to the Police and thereafter sought help.

19. In our considered view, these contradictions and inconsistencies were not material and did not affect the credibility of the witnesses. The trial court which had the opportunity to observe the demeanor of PW1 and PW3 found them to be truthful witnesses and their evidence cogent and independent. We have evaluated their evidence and find no reason to find otherwise. They corroborated each other on material aspects such as the approximate time of the attacks, the number of attackers as well as the flow of events.

20. We are satisfied on this evidence that they were able to observe the Appellant and taking into account that they had known him for quite some time prior to the incident, we entertain no doubt that they were able to recognize him under the circumstances. We therefore find that PW1 and PW3 were positively able to identify the Appellant under favourable conditions.

21. The Appellant also faulted the trial court for failing to consider his alibi defence. It was his testimony that at the time of the alleged attacks, he was in Ngusuret in Laisamis where he had gone on 10/04/2012 and returned to Maralal on 5/05/2012 when he was arrested. The trial magistrate found this defence to be a mere sham and an afterthought and dismissed it. We have considered the alibi defence as against the prosecution evidence and find that it does not in any way cast doubt to the prosecution case. *We therefore find that the conviction was based on overwhelming evidence, dismiss the appeal herein and confirm the conviction.*

22. The Appellant also appealed against the sentence meted out against him. The trial court found that there was only one sentence to be meted out on an accused person convicted of robbery with violence, the death sentence. We have considered the circumstances under which the offence occurred. The Appellants were armed with dangerous weapons including an axe, panga and rungu. During the attack the complainant sustained serious injuries on his right hand and left leg and had a scar which was observed by the trial court during the hearing. However, the Appellant is a first offender. In mitigation the Appellant stated that he was remorseful and that he is the sole bread winner in his family. Taking all these factors into account, we find that the death sentence passed by the trial court was excessive in the circumstances. We therefore set it aside and substitute it with a sentence of 30 years imprisonment.

23. It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of February, 2014

M. J. ANYARA EMUKULE

JUDGE

H. A. OMONDI

JUDGE