REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 125 OF 2012

JOSEPH WAWERU MURIITHI..... APPELLANT

VERSUS

REPUBLIC…….....…….....……..…PROSECUTION

(Being an Appeal from the Conviction and Sentence by J.N. MWANIKI Senior Resident Magistrate Baricho in Criminal Case No. 228 of 2011 on 28th November 2011)

J U D G M E N T

JOSEPH WAWERU MURIITHI was charged at the Principal Magistrate's Court Baricho with the offence of **Robbery with Violence Contrary to Section 296(2) of the Penal Code.** The particulars supporting the charge alleged that on the 19th day of August 2009 at Kimbimbi in Kirinyaga South District within Central Province, jointly with others before court while armed with dangerous weapons namely pangas and axes,the appellant robbed ***JAMES NJAGI THIAKA*** cash Shs.5,000/= and at the time of such robbery wounded the said ***JAMES NJAGI THIAKA.***

The appellant denied the charges. The case proceeded to full hearing at the end of which the appellant was convicted and sentenced to death. He was aggrieved by the conviction and sentence. He filed this appeal through Kiguru Kahiga advocate raising the following grounds:-

1. ***The learned Magistrate erred in law and in fact by holding that the prosecution had established a case of robbery with violence contrary to Section 296(2) of the Penal Code against him whereas the evidence on record fell short of that holding.***
2. ***The learned Magistrate erred in law and fact by holding that he was positively and safely identified by PW2 Ann Wathoiya Njagi and PW3 Francis Njagi Kariuki whereas the circumstances surrounding the attack could not avail the positive identification.***
3. ***The learned Magistrate erred in law and fact by not finding that the alleged torch and lantern lamp could not safely provide proper light intensity to avail positive and safe identification.***
4. ***The learned Magistrate erred in law and fact by failing to fully consider the circumstances of his alleged identification as part of attackers and further failed to warn himself of the dangers of such identification as per established law.***
5. ***The learned Magistrate erred in law and fact by not considering that there was a great lapse of time from date of alleged robbery to the time of his arrest which raises doubts of their involvement and which doubt ought to be resolved in his favour.***
6. ***The learned Magistrate erred in law and fact by holding that the ingredients of a charge of robbery with violence contrary to Section 296(2) of the Penal Code had been been proved yet the evidence on record could not support the charge.***
7. ***The learned Magistrate erred in law and fact by not finding that the absence of the evidence of Complainant James Njagi Thiaka was fatal to the prosecution case and hence the evidence on***

record was not properly corroborated.

8. ***The learned Magistrate erred in law and fact by passing a sentence not based on the weight of evidence on record.***
9. ***The learned Magistrate erred in law and fact by not considering the evidence tendered by him and particularly to occurrence books of the Kimbimbi AP Post and Wang'uru Police Station and which reports or entries failed to mention him as the attacker or robber.***
10. ***The learned Magistrate erred in law and fact by passing a harsh sentence of death which sentence is illegal and unconstitutional.***
11. ***The learned Magistrate erred in law and fact by ignoring his plea that he was framed in the case and failed to consider the long standing land dispute between him and the complainant.***

The case for the prosecution was that on 19th August 2009 at 2 a.m, there was a robbery at the home of ***James Njagi Thiaka*** who was robbed of Shs.5,000/= after being injured. He later died on 10th August 2010 from an injury to the brain as a result of a long standing trauma. He did not therefore testify in this case.

His wife testified as PW2. She testified that when the door to their house was broken, ten people stormed into the house armed with various weapons. She flashed a torch at them but the torch was taken away from her. All the attackers had bright torches which they flashed at her. She said she was however able to identify the appellant with the torch light. She also added that she was attacked in a different house from her husband.

PW3 is a son of the deceased. He testified that he was in his house asleep when the attackers who included the appellant found him. They asked for the deceased. He was then hit and lost consciousness. His lantern lamp was on for a minute. He identified the four people who entered his house as he knew them before. The robbery was reported to the police and arrests were subsequently made. The appellant was the fourth person to be arrested in connection with this case.

PW7 confirmed in her evidence that she treated the deceased on 19th August 2009 at Kimbimbi Hospital. He had several injuries caused by a sharp object (PEXB3). PW6 produced a statement of the deceased dated 28th May 2010 (PEXB2). He was however not the investigating officer.

The appellant in his sworn defence denied having committed the offence as alleged and claimed that there was a long standing land dispute involving his uncles and his brothers suggesting that he had been framed with the offence. The deceased was his uncle. He also denied having gone underground after the commission of the offence.

Two OB reports (DEXB3&4) were produced. One was at Kimbimbi AP Camp (OB No. 02/19/8/2009 03.56 hrs). The 2nd one was OB No. 12/19/8/09 11.20 hours at Wang'uru station. The deceased's written statement and that of PW2 were recorded on 28th May 2010.

When the appeal came up for hearing, Mr. Kahiga argued all the grounds of appeal together. He mainly challenged the identification of the appellant.

The State through learned State Counsel Mr. Amayo conceded to the appeal on the following grounds.

i. There was no proper identification.
ii. The reports made did not mention the appellant (DEXB3&4).
iii. Evidence of a long standing land dispute.

This being a first appeal, this Court is enjoined to re-consider and re-evaluate the evidence adduced before the trial court and draw its own conclusions without ignoring the findings and conclusion of the trial Court. We also bear in mind that we did not have an opportunity to see or hear the witnesses. We stand guided by the following authorities among others.

1. ***PANDYA VS REPUBLIC [1975] EA 336;***
2. ***MWANGI VS REPUBLIC [2004] 2 KLR 28;***
3. ***KINYANJUI VS REPUBLIC [2004] 2 KLR 364;***
4. ***KIILU VS REPUBLIC [2005] 1 KLR 174;***
5. ***NGOME & ANOTHER VS REPUBLIC [2011]***

1 EA 374.

We have considered the submissions made by Mr. Kahiga for the appellant and Mr Omayo for the State alongside the grounds of appeal. We have equally studied the record of the lower Court.

The first issue for us to determine is whether the offence of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** was committed.

The offence of robbery is defined under ***Section 295*** of the ***Penal Code***. Robbery with violence is committed when a theft is committed under any of the circumstances defined under ***Section 296(2)*** of the ***Penal Code***. See ***JOHANA NDUNGU VS REPUBLC [1995] LLR 387.***

The evidence on record confirms that the deceased was attacked and robbed by more than one person, he was seriously injured and the attackers were armed. We are satisfied that this was a case of robbery with violence.

The next issue for determination is whether these acts of robbery with violence were committed by the appellant among others. We note that the robbery occurred in the wee hours of 19th August 2009. The witnesses said they were able to identify the appellant during the robbery being a person they knew before. It was therefore a case of recognition.

Given that the robbery occurred at night, were the circumstances suitable for a positive identification? In the case of ***HUKA & OTHERS VS REPUBLIC [2004] 2 EA 77*** it was held that the trial Court must act with caution in accepting evidence of identification where it is the main basis of the case against an accused person. The law on visual identification of an accused person in difficult conditions has been expressed in various decisions. In ***WAMUNGA VS REUBLIC [1989] KLR 424,*** the Court of Appeal stated thus:-

1. ***Where the only evidence against 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 favourable and free from possibility of error before it can safely make it the basis of a conviction.***
2. ***Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.***

Further, in ***KARANJA & ANOTHER VS REPUBLIC [2004] 2 KLR 140*** , the Court of Appeal stated as follows:-

1. ***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 this danger.***
2. ***Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.***
3. ***Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.***
4. ***In this case, while two witnesses claimed to have recognized the first appellant, the sources of light available at the time were torches and moonlight, and no evidence was given as to the strength of the light emanating from those sources. The trial court and the High Court on first***

appeal did not analyze on the strength and position of the torches.

5. ***As for the second appellant, his conviction was unsafe as it was based on identification by torch light and moonlight the brightness of which was not ascertained by the trial and first Appellate Courts.***

In the case of ***OBWANA & OTHERS VS UGANDA [2009] 2 EA 333*** and ***ETUDEBO & OTHERS VS UGANDA [2009] 1 EA 132*** the Court identified the following conditions as being favourable for a positive identification.

a. ***Whether the accused was known to identifying witness at the time of the offence.***
b. ***The length of time the witness took to identify the accused.***
c. ***The distance from which the witness identified the accused.***
d. ***The source of light that was available at the material time.***

In this case PW2 said she used torch light for a very short while before the torch was taken from her to identify four people three of whom were charged vide Wanguru SRM Criminal Case No. 586/2010 and released vide Embu HCRA No. 80/2012 consolidated with HCRA No. 81/2012 & 82/2012.

She further stated that ten (10) people had entered her house with bright torches which they flashed at her. If indeed the torches were as bright as she says and they were all being flashed at her, was she in a position to see and positively recognize/identify four people in those circumstances? PW3 also claimed to have recognized the appellant among others. Assuming for a moment that they did recognize them what steps did they take?

i. A report was made by PW2 at Kimbimbi AP Camp (DEXB3) on 19th August 2009 at 3.56 hours. She did not mention any name.
ii. A report was again made by the deceased on 19/8/2009 at Wang'uru Station at 11.20 hours. He only mentioned the names of Benson Muchiri Juma as one of his attackers. Benson was not one of the suspects tried in the Wang'uru case and neither is he the appellant herein. PW3 did not also give the names of his attackers to the relevant authorities.

If indeed these witnesses knew and recognized the robbers, what stopped them from mentioning their names? In the case of ***SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192*** the Court of Appeal stated the following:-

1. ***In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given.***
2. ***The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity.***

We do find that the witnesses did not mention any names because they did not either know their attackers or were not sure of their identities. We note that in a belated move, PW2 and the deceased recorded statements with the police on on 28th May 2010 which was nine (9) months after the robbery in which they purported to mention names of the attackers. There was no explanation sought or given for this late recording of statements. These in our view are not statements which can be relied on.

Finally, the learned trial Magistrate failed to consider what appeared to be a common thread running through the Prosecution's evidence and the defence that the deceased and all the persons allegedly identified as suspects in the robbery were members of the same family who had a long standing land dispute. We are persuaded to find that in such circumstances, the possibility of the charges being a frame up cannot be said to be farfetched.

We agree with learned counsel for both parties that the circumstances in this case were not conducive to a

positive and correct identification/ recognition of the robbers. We are therefore satisfied that the appellant was not properly identified. And from our own evaluation of the evidence on record as a whole, we have come to the conclusion that the prosecution failed to prove the charge of robbery with violence against the appellant beyond any reasonable doubt. We find that the appeal is merited. We consequently allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF FEBRUARY 2014.

H.I. ONG'UDI **C.W. GITHUA**

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In the presence of:-

Mr Sitati for State

Mr Kahiga for appellant

Mbogo Court Clerk