REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 74 OF 2012

JAMES KAMAU KAMOTHO.. .....APPELLANT

VERSUS

REPUBLIC…….…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 1277 of 2004 by J.N. ONYIEGO– PM in the Senior Principal Magistrate's Court at Kerugoya on 11/4/06

J U D G M E N T

JAMES KAMAU KAMOTHO the Appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars supporting the charges as stated in the charge sheet Were that on the 16th day of August 2004 at Rukanga village in Kirinyaga District within Central Province, jointly with others not before Court and while armed with dangerous weapon namely sledge hammer, iron bars and explosive device robbed Joseph Maina Nyamu of cash shs.4, 000/=, two mobile phones make alcatel 311, all valued at ksh.16, 000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Joseph Maina Nyamu.

He was also charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. Particulars being that on the 16th day of August 2004 at Rukanga village in Kirinyaga district within Central Province, jointly with others not before Court and while armed with dangerous weapon namely sledge hammer, iron bars and explosive devices attempted to rob Haman Wamburu Wanyoro.

The Appellant had been charged alongside three (3) others. They all pleaded not guilty and the matter proceeded to hearing and they were all acquitted of count two (2). But on count one (1) Danson Macharia Kamau (Accused 4) was acquitted while the Appellant James Kamau Kamotho and Stephen Mwangi Kahigah were convicted and sentenced to death. Jimna Maina and Stephen Mwangi filed appeals vide Embu HCRA 24/07 and 18/07 respectively. Both appeals were allowed but with a retrial for Stephen Mwangi on 3rd March 2008. The Appellant filed his appeal much later. He is challenging both conviction and sentence raising four (4) grounds of appeal as follows;

1. **The learned trial Magistrate erred in law and in facts in convicting the Appellant by putting reliance on the evidence of purported visual identification which was not conclusive as free from error or mistake pertaining to the circumstances and the conditions that prevailed at the ordeal.**
2. **The learned trial Magistrate erred in law and fact by putting reliance in convicting the**

Appellant on the evidence of the identification parade conducted in his respect yet failed to note that the same was conducted contrary to the chapter 46 of Force Standing Orders; Rule 6(iv) letters "a", "c" "d" and "k".

3. **The learned trial Magistrate erred in law and fact in convicting the Appellant while relying on his mode of arrest and recovery of the prosecution exhibits produced in evidence.**
4. **That similarly the learned trial Magistrate erred in both law and fact in dismissing the Appellant's defence and thus violated the provisions of section 169(1) of the Criminal Procedure Code.**

The Prosecution case is that PW1 was asleep in his house with PW3 and the children. Their house is behind their shop. On 16/8/2004 at 3am they heard dogs barking and a while later the gate chain was cut and people flashing torches entered the compound. PW1 peeped through the window and saw more than six (6) people. The thugs tried to break the door in vain and resorted to breaking the wall. They created a hole therein and managed to enter the shop. The metal door was forced open and four (4) men entered. They demanded for money. One person held a big hammer. PW1 was ordered to lie down. He showed them the drawer with money. As they flashed torches around he was able to identify one person whom he later identified at the identification parade conducted by PW6. The attackers went away with their two mobile phones and cash shs.4100/=. Later he identified his recovered phone (EXB2). He produced a receipt for this phone (EXB3). The phone (EXB2) had been recovered from the Appellant's co-accused. The Appellant and three others were arrested on the same night of the robbery. It was also indicated that at the time of arrest the Appellant had been arrested with some explosive device.

In his unsworn defence the Appellant denied the charges. He said he was in his business of buying rice when he met police officers at Sagana. They searched him and took away his mobile phone Nokia 3310. They took him to some home where a lady was asked to identify her phone. He denied committing the offence.

When the appeal came up for hearing, the Appellant presented the Court with written submissions. In his submissions he mainly challenged his identification by PW1. He claimed that the conditions prevailing could not favour a positive identification. Secondly, the identification parade was not properly conducted. He denies having been arrested with any of the stolen items.

Mr. Amayo, learned State Counsel opposed the appeal submitting that the Appellant was arrested with shs.2000/= plus an explosive device. And that he was later identified at an identification parade. Further the learned trial Magistrate warned himself of the danger of relying on the evidence of a single witness.

This is the first appellate Court and we have a duty to re-evaluate the evidence and arrive at our own conclusion. We also bear in mind that we did not see nor hear the witnesses. In the case of ***KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174*** the Court of Appeal stated thus;

i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

Having been so guided we proceed to analyse the evidence. The 1st issue we shall deal with is whether the offence of robbery with violence took place. PW1 explained that when he peeped through the window after hearing the dogs barking, he saw more than six (6) people. They gained entry into the house after creating a wall therein. They had used some metal hammer to break into the wall. They then stole the day's proceeds (shs.4, 100.00) plus two phones. We do find that the attackers were more than one and they were armed with dangerous weapons. It is also clear that they stole cash from the shop of PW1. We are therefore satisfied that the ingredients of the offence of robbery with violence as out in

section 296(2) of the Penal Code were proved by the evidence adduced in this case.

Our next issue for determination is whether the Appellant was one of the robbers. Was the Appellant found in possession of any of the complainant's stolen items or any item relevant to this case? PW6 and PW7 were the officers who arrested the Appellant who was the 3rd accused in the Magistrate's Court. At page 40 lines 2-6, PW6 stated as follows;

> ***"We arrested 3rd and 4th accused. We searched them. Accused 3 had shs.2000/=, Accused 3 had fire work metal device which can produce sound like a gun when blown. He had two packets of fireworks. The metal device made of piped metal can be used when the heads of a match box are put inside and blown. It can produce sound".***

PW7 in his evidence in chief indicated that after arresting the Appellant and Accused 4 they recovered an explosive metal device used for scaring people as if it was a gun. However in cross examination by the 4th accused (who is not the Appellant) he stated as follows at page 44 line 16;

> ***"We recovered an explosive device from you. You did not use it".***

It can clearly be seen that the evidence of PW6 and PW7 on the recovery of the explosive device is contradictory. It's therefore not clear who indeed had the said device. We also wish to point out that being in possession of such explosives without a permit or licence is an offence under ***"The explosives Act Cap 115 Laws of Kenya"***. And if indeed such an explosive device was found with the Appellant or anybody else the person ought to have been charged accordingly. We have looked at the charge sheet herein and have not seen such a charge. Our conclusion is that the arresting officers PW6 and PW7 did not prove beyond doubt that they actually recovered the explosive device produced as exhibit 6 from the appellant or any of his co-accused.

The evidence which is the basis of the Appellant's conviction is the evidence of identification. The only witness who identified the Appellant is the complainant (PW1). This is what the learned trial Magistrate said about this evidence at page 55 lines 17-21 of his Judgment;

> ***"I am convinced that PW1 positively identified him during the robbery. Although nobody else identified him, the evidence of PW1 although not corroborated is sufficient. I have warned myself of the dangers of convicting on the evidence of a single witness and I do not find any miscarriage of justice in this case".***

This incident occurred at 3am when PW1 and his family were asleep in their house. It was therefore dark as there was no light in that house. Still on the case of ***KIILU & ANOTHER –V- REPUBLIC [2005] KLR 174 (Supra)*** the Court of Appeal stated this on the evidence of a single witness;

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error".***

Further in the case of ***OGETO –V- REPUBLIC [2004]2 KLR 14*** the Court of Appeal had this to say on the evidence of a single identifying witness;

"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence."

We now wish to re-examine the identification evidence adduced in this case. PW1 said he was ordered to lie down by the attackers. In his evidence in chief he did not explain how he was lying down and how he was able to see the robbers. In cross examination however, he said that he was lying down on his right side. This does not still assist because he did not explain if he lay on the side while facing the attackers to see them. Out of the four (4) people who entered the house, PW1 was only able to identify the Appellant whom he had never seen before. The witness said he used torch light from the torches of the attackers to identify the Appellant. This evidence needed to be carefully tested for the Court to be sure of its credibility. The Court of Appeal in the case of ***MAITANYI –V- REPUBLIC [1986] KLR 198*** stated the following of such evidence;

1. ***When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.***
2. ***The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.***
3. ***Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.***

The record does not show that the learned trial Magistrate made any inquiries as to the intensity of this torch light, and how long PW1 had been with the attackers.

In the case of ***WAMUNGA –V- REPUBLIC [1989] KLR 424*** where the robbery had been committed at night and the only form of lighting were torches carried and flashed by the robbers and the victims woken from sleep as in the case here, the Court of Appeal found the evidence of identification not to have been free from error. It is true the Appellant was identified on the identification parade conducted by PW5. What was the basis of this parade? Did PW1 give any description of the Appellant as he alleges? PW6 and PW7 clearly stated that they were not given any description of the robbers. Before an identification parade is arranged the identifying witness ought to give some form of description to enable the officers concerned to arrange for the parade. The description is therefore very important. The Court of Appeal in the case of ***SIMIYU & ANOTHER –VS- REPUBLIC [2005]1 KLR 192*** had this to say;

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.***

In this case there was no description of the Appellant given to the police. There is also evidence that as the police took the suspects to the police station they shouted for PW1 to follow them to the station. At what point did PW1 follow them? Could he have been in a position to see the suspects as he followed them to the Police Station? This was an issue that remained hanging. The Appellant in his defence denied committing the offence. Our analysis of the evidence leads us to the conclusion that the identification evidence upon which the Appellant's conviction was based was not shown to have been free from the possibility of error. We find that the evidence on record was insufficient to support a safe conviction . The result is that the appeal is merited and it is hereby allowed. The conviction is quashed and the sentence of death set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

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H.I. ONG'UDI

JUDGE

C.W. GITHUA

JUDGE

DATED, DELIVERED AND SIGNED AT KERUGOYA THIS 21st DAY OF FEBRUARY 2014

In the presence of:-

Mr Sitati for State

Mbobo Court Clerk

Appellant