REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 134 OF 2009

{FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 287 OF 2008 IN THE SENIOR RESIDENT MAGISTATE'S COURT AT MAKUENI – F M NYAKUNDI [PM]

ON 23RD JULY, 2009}

DANIEL KAVOI KASIVO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT.

The Appellant herein **Daniel Kavoi Kasivo** has filed this Appeal challenging his conviction and sentence**.** The Appellant had initially been arraigned in Court on 19/3/2009 with two counts. ***The first Count: (1)Robbery with Violence contrary to Section 296(2) of Penal Code and the Second Count (2) Kiosk breaking and committing a felony contrary to section 306(2) of the Penal Code***. However after the close of the prosecution case, the Appellant was acquitted on Count 1 and later was

convicted and sentenced on Count 2 of **Robbery** with **Violence contrary to Section 296(2) of the Penal Code**.

The particulars of the offence were that on the 6th day of April, 2007

at Kathonzweni village in Makueni District within Eastern Province, jointly with others not before Court while armed with dangerous and offensive weapons namely guns, pangas and axes robbed one **Martin Munyao Nzioka** of **Kshs. 10,000/=** and at the time of such robbery threatened to use personal violence to the ***said Martin Munyao Nzioka.***

The Appellant herein entered a plea of 'not guilty' to the charge and the trial commenced on 4/5/2009. The prosecution led by Inspector Katimo called a total of six (6) witnesses in support of its case. The Complainant ***(PW1) Martin Munyao Nzioka*** told the Court that on 6/4/2007, he was travelling to his rural home in Makueni from Nairobi. He further told the Court he was in Company of his brother **Michael Kyalo,** his mother and two of his brother's children. That they arrived at Wote at 1.00 am and as they headed to Kathonzweni , their motor vehicle got stuck in the mud. His brother went to seek for help while PW1 remained in the motor vehicle with his mother and the two children. After about 20 minutes, PW1 saw two (2) men through the moonlight. The two men had a torch and shone it at him.

Then one of the men tried to open the door and PW1 came out. One of the men had a panga and a torch and the other a firearm. He was ordered to raise his hands which he did.

Then the two men demanded money and PW1 gave them KSh. 10,000/- that he had. They also robbed 500/- from his mother and also stole a spanner, pliers and a jack from the vehicle. They tried to take the battery but they were unable to do so.

PW1 further told Court he recognised one of the two men as he used to see him between Kathembe and Kathonzweni. That their home was close to PW1's home. He **knew that man as Daniel Kavoi the appellant in Court.** PW 1 also stated the man had a nick name of ' 'Mboi'. After robbing him, the two men left and warned them not to scream. Later his brother came back with a tractor and they removed the motor vehicle. They went back to Wote where a report was made at the Police Station. He reported that he had recognised one of the robbers and gave the Police his name. Later he was called by the Police in the year 2008 and told that **Kavoi** had been arrested. He identified **Kavoi** as the accused person (appellant) who was in Court.

After the close of the prosecution case, the Appellant was found to have a case to answer on the offence of Robbery with Violence and was placed on his Defence. The appellant gave a sworn statement and called no witness. The appellant denied the charge and stated that on 16/7/2008 he was travelling to his aunt's place at Kilala.

He alighted at West Ngosini to take tea. While in the hotel, a person not known to him called him and told him the chief wanted to meet him. Then the Chief went and arrested the appellant and took him to the D.C.I.O Makueni . He was later charged with the present offence after his finger prints were taken. He told the Court he knew nothing about the offence.

We have carefully perused the record of the trial before the lower court as well as the petition by the appellant herein and the oral submissions in Court. We are guided by the Court of Appeal case of **Okeno Vs Republic (1972) EA 32** , where the role of the first appellant court is given as follows:-

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya Vs Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shanlal M Ruwala Versus Republic (1957) EA 570). 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;. It must make its own findings and draw its own 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''.

The appellant raised nine grounds of appeal but his counsel **Mr Mutua Makau** condensed them into three;

(i) *Identification*

(ii) Uncorroborated evidence

(iii) Ingredients of the offence not met.

On the question of identification, the appellant submitted that the offence alleged occurred at 1.00 am.The source of light was a torch allegedly held by the appellant.The appellant submitted that it was not easy to see the person shining the torch at PW1.That further none of the other three persons who were with PW1 testified in court.There was a danger that out of fear, PW1 was not able to see his attackers well.The appellant relied on two cases to support his submissions.In the case of **Robert Gitau Wanjiku Vs Republic CR Appeal No 13 of 1990** quoting from the case of **Abdullah Bin Wendo** and **Another Vs Republic 1953,** it was held that:-

"The evidence of identification should be treated with great care especially when it is known that the conditions favouring a correct identification were difficult".

Appellant further relied on the case of **Joseph Leboi Ole Toroke Vs Republic CR Appeal No. 204 of 1987** where the Court of Appeal observed that :-

In her submissions, Ms Maingi the learned state counsel , on behalf of the state submitted that the witness relied more on recognition rather than identification.PW1 testified that the attackers had a torch that they shone on him and there was moonlight and PW1 saw the appellant well. He identified him by his nick name of **" Mboi"** and he reported to the police. PW1 told the court that although the offence occurred at night, he was able to recognise one of the two men.In his words PW1 told the Court:-

"The man who had a panga, I used to see him, at the area between Kathembe and Kathonzweni. I do know his name as Daniel Kavoi and is also known as " Mboi" within the area. It is like a nickname".

PW1 even in cross – examination by appellant confirmed that he recognised him and knew him by name and gave his name to the police.It is clear therefore that PW1 knew the appellant well as they come from the same area and he gave his name to the police.There was clear evidence of recognition which was to be ***"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"*** see **Anjononi & Another Vs Republic 1980 KLR 59.**

The appellant also submitted that the learned trial magistrate erred in relying on the evidence of identification by a single witness.

The trial Magistrate in her judgement warned herself against the danger of convicting the appellant relying on the identification by a single witness.To quote her judgement in verbatim, it states on page 4:-

"I have warned myself of the danger of convicting an accused person relying on the identification by a single witness.However, in this particular case, this was identification by recognition. The complainant knew the accused person well before this day and was able to recognise him by means of moonlight and gave the name of the accused person to the police".

The trial magistrate herein was therefore satisfied that PW1 recognised the appellant as he knew him before and could not have mistaken him.The issue of recognition was dealt with in the case of **Republic Vs Turnbuill (1976) 3 All ER 549 at Page 552** where Widgery C J stated that:-

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made".

Having re-evaluated the evidence on record, the court finds that the learned trial magistrate correctly found that PW1 identified the appellant whom he knew well through recognition.

The other ground of Appeal was that the available evidence was uncorroborated.That the trial magistrate relied on a single witness who testified in court.That though the trial magistrate warned herself she should have asked why the other three persons did not testify. The appellant relied on the case of **Charles O Maitanyi Vs Republic Criminal Appeal No. 6** of **1986** where the Court held that:-

"Although a fact may subject to well-known exceptions be proved by the testimony of a single witness, it was necessary to test the evidence of a single witness respecting identification with the greatest care especially when the conditions favouring a correct identification were difficult".

The learned State Counsel herein submitted that the learned trial magistrate warned herself of the danger of relying on a single witness but was satisfied with the evidence given by PW1.We have properly tested the evidence of visual identification in this case (recognition) and we have found that PW1 who was in

the motor vehicle saw two men. He saw them through the moonlight. PW1 told the court that one of the men had a torch and shone it at PW1.PW1 identified one of the men as the appellant.He knew him before as ***' Mboi'*** which was a nickname.The two assailants also took some time around the motor vehicle as they ransacked it.The attackers also ordered PW1 to sit down and they took away his money ***(Kshs.10,000/=).***During that time PW1 saw the assailants and he recognized the appellant herein.PW1 was therefore not mistaken as he knew the appellant well. It was evident that when PW1 reported the matter to Wote Police Station he gave the name of one of the robbers to the Police. PW1 gave out the name of the appellant herein as one of the attackers. This aspect was confirmed by PW6 in his testimony in court.

Though PW1 said he was with his mother, he admitted that his mother was not a witness as she was sick and did not record her statement. Having analysed the evidence of PW1, we found that though uncorroborated, it was sufficient to confirm that it was the appellant who committed the offence.

The third ground of Appeal was that the ingredients of the offence of robbery with violence were not met.The appellant relied on the case ***of Erick Amwata Onono Vs Republic Criminal Appeal No. 315 of 2010*** which set out the ingredients of the offence of Robbery with Violence.The same were also set out in the case of **Olouch Vs Republic (1985) KLR 549.**These ingredients are:

i. ***That there are two or more assailants***
ii. ***The assailants are armed with dangerous and/ or offensive weapons***
iii. ***Violence is visited upon the victim in the course of the theft.***

In this case, the evidence is that, while PW1 and others were in the car at around 1.30 am, when they were accosted by two men. One had a panga and the other a firearm.They threatened PW1 and robbed him of ***Kshs.10,000/=, car jack and pliers***.However, PW1 was not assaulted but was threatened with violence, if he ever screamed.

The appellant submitted that no evidence of violence was adduced by the complainant.However the learned state counsel submitted that PW1 testified that the appellant was yielding a panga and was with another not before court.

That though no violence was meted on PW1, the ingredients of the offence as stated in Section 296(2) of the Penal Code is **" use" of "or"**. That if any of the ingredient is proved, then that is sufficient to return a conviction of robbery with violence.

Having analysed the evidence on record, it is evident that PW1 adduced evidence that the assailant had a panga and a firearm.The two weapons fall under the description of dangerous weapons.The assailants were more than one and they threatened the Complainant herein.In the present case, the Court finds that the ingredients of robbery with violence were satisfied as was held in the case of **Johanna Ndungu Versus Republic Cr. Appeal No.116 of 2005** (unreported).

After a careful analysis and re-evaluation of the evidence on record, we are satisfied that the assailants having numbered more than one and being armed with dangerous weapons and having threatened the complainant with violence , the ingredients of **Section 296 (2)** of the **Penal Code** have been satisfied.

For the foregoing reasons, we uphold the convictions and confirm the sentence.

The appeal is dismissed.

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

JUDGE **JUDGE**

Dated and delivered this 18th day of February 2014.

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