REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 260 OF 2011

(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Mumias in Criminal Case No. 878 of 2010 [H. WANDERE, SRM] delivered on 15th November 2011)

PETER OKELLO ….....……..……..……. APPELLANT

VERSUS

REPUBLIC ….....…….…….. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of charge were that on the night of 21st August 2010 at Bukaya location, Mumias District within Western Province jointly with another not before court while armed with dangerous weapons namely rungus robbed JOHN OKOTH one motor cycle make Boxer Bajaj registration numberless valued at Kshs.78,000/= and at the time of such robbery used actual violence to the said John Okoth Obare by injuring him.

In count II he was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that on the same day and place jointly with another not before court unlawfully assaulted Fredrick Owour Ochieng occassioning him actual bodily harm.

He denied both charges. After a full trial, he was convicted on both counts . He was sentenced to suffer death on count I as prescribed by law. He has now appealed to this court through C. A. Mwebi & Co. advocates.

At the hearing of the appeal, Mr. Mwebi, learned counsel for the appellant submitted that the offence occurred at night. It was counsel's view that the allegation that the appellant was identified through the light of the motor cycle was not based on cogent evidence. The description given to the police officer, PW3 was that the complainants or eye witnesses only identified the clothing and not the appearance of the appellant. In addition, the chief said that he got the identity of the appellant from an informer who did not testify in court. In counsel's view, the identification of the appellant was not positive. Another blunder was that the officer who conducted an identification parade did not testify in court. Lastly, counsel argued that the learned trial magistrate dismissed the detailed sworn defence of the appellant without valid reasons. The appellant gave an alibi defence. Counsel urged the court to allow the appeal.

Mr. Oroni, the learned Prosecuting Counsel opposed the appeal and supported the conviction and sentence. Counsel relied on the evidence of PW1 who knew the appellant before by appearance. Counsel also stated that the defence of alibi was not corroborated by any witness called by the appellant.

The facts of the case are in brief that on the 21st August 2010 at about 10.00 p.m., John Okoth Obare,

PW1 was riding an unregistered motor-bike which he had purchased from Khetia super market. He was carrying his brother Fredrick Ochieng Owour, PW2. He was going home along the road from Wuaya to Bukaya in Mumias sub-location. When he reached a place called Murua, two people emerged wearing jungle jackets. One had a dotted jacket and this was the appellant. They hit him on the left hand with a rungu or club and wounded him. They also hit him on the left side of the head and he fell off the motor-bike. PW1 said that he knew the appellant before by appearance. The brother of PW1, Fredrick Owour Ochieng, PW2, was also injured and ran and disappeared into the bushes. Both PW1 and PW2 stated that they saw the appellant ride on the motor-bike carrying his co-assailant.

The appellant was later arrested on information given to the area chief, Watende Mahero PW4. He was taken for an identification parade and identified by PW1. He was subsequently charged with the offences.

In his defence, the appellant testified on oath. He denied the charge. He said he was arrested by APs who surrounded his house and took him to the cells. He stated that he was identified at the parade by someone who never testified in court.

Faced with this evidence, the trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. He was convicted on both counts and sentenced to suffer death on count I as prescribed by law. Therefrom arose this appeal.

We have to start by reminding ourselves that this being a first appeal, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences. See the case of **Okeno -vs- Republic [1972] EA 32.**

We have re-evaluated the evidence on record. The conviction of the appellant is grounded on the evidence of identification or recognition by eye witnesses PW1 and PW2. Evidence of visual identification may be the basis of sustaining a conviction in a criminal case. However, the court is required to ensure that there is no possibility of mistaken identity before convicting an accused person on the same. In the case of **Wamunga -vs- Republic [1989] KLR 424 at 430** the court stated as follows with regard to convictions based on identification -

> ***"Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge must warn himself of the special need for caution before convicting the accused person in reliance on the correctness or the identification or identifications or both."***

In the present case, the incident occurred at night at around 10.00 p.m. It was on the road. The evidence is that the appellant was seen or identified or recognized by PW1 through the lights of the motor-cycle. There is no evidence that the motor-cycle headlamp flashed on the face of the appellant, and for how long and at what distance. There was an identification parade conducted where the appellant was picked by PW1. However, the identification parade was not of much evidential value. Firstly, if indeed PW1 was familiar with the appellant as he said, then there would be no need for such an identification parade. Secondly, the appellant claimed that he was identified by a witness who did not testify in court. That was a serious allegation. The parade officer did not come to court to testify on how he conducted the parade, and clarify whether the allegation by the appellant was true. In our view, the parade form was erroneously admitted in evidence. There was no basis laid down for production of the identification parade form in the absence of the parade officer. Same could not be relied upon to convict the appellant as the learned magistrate did. In our view, the identification of the appellant was far from positive.

In addition to the above, the informer who gave information to the Chief PW1, which led to the arrest of the appellant did not come to court to testify. Further, the motor-bike operators who gave adverse information about the appellant did not come to court to testify. These were crucial witnesses and the failure by the prosecution to call them means that the prosecution failed to discharge its burden to prove the appellant guilty beyond any reasonable doubt. See **Bukenya –vs- Uganda [1972] EA 549**. From the

evidence on record, it is apparent that the appellant was infact arrested because he had previously caused trouble to motor-bike operators, rather than for being involved in the robbery. That cannot be a basis for convicting him for the charges herein.

Thirdly, the appellant gave a defence of an alibi. In dismissing the alibi defence, the learned trial magistrate did not consider the possibility of its truth. The learned trial magistrate should have evaluated the alibi defence as against the prosecution case. He did not do so. Counsel for the appellant has raised this issue and we agree with him.

The burden of proving a case against an accused person beyond reasonable doubt always rests with the prosecution and never shifts to the accused even in cases of an alibi defence. In the case of ***Sekitoleko -vs- Uganda [1967] EA 531*** where the Ugandan High court held as follows with regard to the defence of alibi -

1. As a general rule of law, the burden of proving the guilt of a prisoner beyond any reasonable doubt never shifts whether the defence set up is an alibi or something else.(R. -vs- Johnson [1961] e All ER 969 applied; Leonard Aniseth -vs- Republic [1963] EA 206 followed).
2. The burden of proving an alibi does not lie on the prisoner and the learned magistrate misdirected himself.

Having re-evaluated all the evidence on record, we come to the conclusion that the conviction of the appellant is not safe. It cannot be sustained. We allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 11th day of February, 2014

SAID J. CHITEMBWE **GEORGE DULU**

JUDGE **JUDGE**