REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 373 OF 2009

REPUBLIC …….RESPONDENT

VERSUS

PETER KINYUA MUMBI……..APPELLANT

*[Being an appeal from the original conviction and sentence by Hon. L. Gicheha S.R.M. dated 1st September 2009 in Thika Case No. 2945 of 2008]*

**JUDGMENT**

1. The appellant herein, **Peter Kinyua Mumbi** was arraigned before the Chief Magistrate's Court in Thika on two counts of robbery with violence. The particulars of Count I were that on 11th day of July 2008 near Thiririka River in Gatundu District within Central Province jointly with others not before court robbed Samuel Muhia Kimani of a numberless Motor-bike red in colour, Chasis No. S86000383, Engine No. 0688 make Jincheng valued at KShs.68,500/- and cash KShs.350/- all to the total value of KShs.68,850./- and immediately before the time of such robbery threatened to use actual violence to the said Samuel Muhia Kimani.
2. The particulars of Count II are that on 11th day of July 2008 near Thiririka River in Gatundu District within Central Province jointly with others not before court robbed Samuel Njoroge Ndutire of his mobile-phone Motorolla C168 valued at KShs.4,500/- and cash KShs.900/- all to the total value of KShs.5,400/- and immediately before the time of such robbery threatened to use actual violence to the said Samuel Njoroge Ndutire.
3. The prosecution called 3 witnesses while the appellant gave a sworn statement and did not call any witnesses in his defence. The prosecution case was that the appellant together with 2 other people accosted the complainants and robbed them as particularized in the charge sheet aforestated. PW1 **Samuel Njoroge** was the passenger on the motor-bike. He testified that on the material day he had hired the motor bike to take him home at Ithingu. As they approached the bridge three people accosted them. They each had a torch and a 'rungu'. He heard them shout *"Afande shika huyo"* and that immediately one of them grabbed him and dragged him to the bushes about 20 metres away and robbed him of his phone make Motorolla C168-4500 and Kshs.900. He further testified that immediately he was released he went to the main road and boarded a matatu to Gatundu Police Station where he made a report. PW1 stated that he did not recognize the robbers.
4. **Samuel Muhia Kuria** was the motor cycle rider. He testified as PW2. He stated that the incident took place at 9p.m. near the bridge; that 3 people came out of the bushes and shone their torches on him and he lost control and fell. They tied his feet and hands with shoe laces, grabbed his motor-bike and left. He testified that he saw and recognized Kinyua as one of the robbers; that Kinyua held the motorbike and was wearing a big black jacket.
5. PW3 was one **John Gitau Ngaru**. His testimony was that he was the owner of the motor cycle. He showed a receipt for its purchase (MFI.1) and a logbook (MFI.1). **No. 58417 Corporal**

**Andrew Khasuguli** of CID Gatundu was the investigating officer in the case. He testified as PW4. It was his testimony that the accused had already been arrested by members of the public when he took over the case. That upon interrogation, the accused informed him that the motor bike was in the custody of his colleague and was hidden at Rwera farm. The accused led him to the said farm but did not find the motor bike. That subsequently he led them to Gituamba but they also did not find it. The Investigating officer produced the purchase receipt and logbook of the motor vehicle as exhibits in the case.

6. At the close of the prosecution's case, the appellant was put on his defence. In the typed proceedings, it is indicated that he gave a sworn statement. In the handwritten record however, it reads "unsworn". Further both the typed proceedings and the handwritten show that the accused was not cross-examined which to us confirms that his statement was unsworn. In his testimony the accused stated that he woke up on the morning of 3rd March 2008 and went to buy and sell bread at Mugare as was his usual business. That afterwards he saw a crowd of people and on approaching it to enquire what was going on, one person pointed at him and the crowd started attacking him. He said that he ran to the nearby police station and on getting there, people followed him to the police station and said that he had stolen their motor cycle. He further stated that he was locked up at the police station and thereafter charged with an offence he knew nothing about.
7. At the conclusion of the trial, the court convicted the appellant on both counts and sentenced him to death as provided by law.
8. The appellant has now come to this court on appeal. In his memorandum of appeal dated 8th September 2009 he sets out the grounds reproduced herebelow:-

1. *That the learned trial magistrate erred both in law and facts when she convicted me in this case by relying on mistaken identity which was made by PW1 since there was insufficient light at the scene.*
2. *That the learned trial magistrate erred both in law and facts when she convicted me in this case without her considering that I was never in any possession of the said motorcycle.*
3. *That the learned trial magistrate erred both in law and facts when she convicted me in this case while relying on single witness which is against the law.*
4. *That the learned trial magistrate erred both in law and facts when she rejected my defence without giving proper reasons for rejecting thus violating the law as per section 169(1) Criminal Procedure Code.*

9. The appeal came up for hearing before us on 22nd October, 2013. We heard oral submissions from **Ms. Njuguna** learned counsel for the respondent. We also received written submissions from the appellant. His only oral submission was that he was wrongly convicted. In her oral submissions **Ms Njuguna** told us that the prosecution proved the case in the trial court beyond reasonable doubt. She summarized the evidence before the trial court and submitted that PW2 recognized the appellant at the time of the robbery. He knew him by his name (Kinyua) and described that he was wearing a black heavy jacket. She prayed that the conviction be upheld.
10. We have carefully considered the appellant's written submissions. They dwell on four key issues. Firstly, he submits that there was no evidence to secure his conviction on the 2nd count as the complainant who testified as PW2 clearly told the court that he did not recognize his attacker. Secondly, he submits that the court erred in convicting him on the evidence of a single identifying witness without testing that evidence to ensure that it was free of error. Thirdly, the appellant faults the court for believing and relying on the testimony of (PW)1 as a single identifying witness who also identified him under difficult circumstances. The appellant has cited to us a number of authorities to buttress his submissions. They include **Republic Vs. Turnbull (1976) 3 All ER 549; Kamau Vs. Rep. (1975) EA 139; Cleophas Otieno Wamunga Vs. Rep. Criminal Appeal No. 120 of 1939;** and, **Abdalla Bin Wendo & Anor. Vs. Republic 20 EACA 166.** We shall return to them later.
11. As a first appellate court, we are under duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. This duty has been stated and restated in many decisions both by the High Court and Court of Appeal See **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32**. See also **Mwangi –vs- Republic [2004] 2 KLR 28**

where the court held that "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 have the appellate court's own decision on the evidence."

12. Having considered the record and the respective submissions of the parties, and bearing in mind our duty as a first appellate court, we consider that this appeal must turn on the issue whether or not the evidence of recognition upon which the appellant was convicted was free from error. Indeed all the grounds of appeal and the appellant's submissions revolve around this one issue.
13. In **Wamunga Vs. Republic, 1989 KLR 424** (to which the appellant referred us) the court of appeal called for special caution in use of visual identification. It stated thus:-

*"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. Whenever the case against a defendant 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 defendant in reliance on the correctness of the identification.…."*

14. In the present appeal however, we find from our independent analysis of the evidence that the possibility of error in identifying the appellant was minimal. This is someone whom the appellant knew before. He did not merely identify him he recognized him as Kinyua. Further, we find that the trial court correctly warned itself on the dangers of convicting on the evidence of a single identifying witness and still came to the conclusion that the appellant was properly identified. In his testimony, PW 1 stated: *"Kinyua held the motorbike that night. I saw him clearly. I know him and usually see him at Gatundu, that day he wore a big black jacket…."* This testimony was not shaken in cross-examination. PW2 stated *"I know you well. In my report I wrote your name Kinyua that I knew. I knew you and recognized you. I saw you from the lights of the motor bike.…."*
15. In **Abdallah Bin Wendo V. R. 20 EACA 168** the Court Of Appeal stated thus:-

*"Subject to certain well-known exceptions it is trite law that a fact may be proved by the 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 correct identification were difficult. <u>In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt,</u> 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 possibility of error."* (emphasis added)

16. In the present appeal, it cannot be said that the court relied solely on the evidence of PW2. PW 1 was also a victim of the same robbery and his account corroborates that of PW2. PW 3 the investigating officer testified that when he commenced investigations into the case, the appellant (then a suspect) told him that the stolen motor cycle was in the custody of his accomplice. He subsequently led him to two different houses in Rwera farm and Gituamba respectively but they neither found the motorcycle nor the suspect's accomplices.
17. These facts were not challenged by the appellant while cross-examining the witness. From our analysis of the testimonies PW 1 & 3, we find other evidence which point to the guilt of the appellant. We find that the caution in **Abdalla Bin Wendo** *(supra)* was indeed exercised by the trial court.
18. The appellant, has contested his conviction on count II. He contends that he was wrongly convicted on Count II despite the victim stating that he did not know who robbed him. From the record, it is indeed true that PW1 said that he did not recognize the robbers. By the account of PW1, he was a passenger in the motor cycle when the rider and himself were accosted by a group of 3 people. One held him and dragged him to a bush nearby where he robbed him of some money and a mobile phone. He stated that he did not recognize the robber.
19. Be that as it may, from the totality of the evidence as already analysed above, we have found sufficient proof that the robbery did take place; that the appellant was in the company of two others; and, that they were not only armed but exerted violence on the motor cycle rider as (PW2), subdued him and made away with the motor cycle. PW 1 was robbed in the course of the same

transaction. The robber not only acted in concert with the appellant but had a common intention to rob the two. The evidence clearly shows that the ingredients of the offence were proved.

20. That being the case, it is immaterial that PW1 did not identify who actually robbed him: It is sufficient that PW2 who was the primary witness positively identified the appellant. He is the one who stated in his testimony that he was forced to slow down the robbers when they shone bright torches on him. He said that he had seen the robbers with the aid of his motor cycle headlights before being blinded, that he saw and recognized Kinyua as one of them and as the one who held the motor cycle, that he knew Kinyua before. Contrary to the appellant's contention that the trial court erred in believing this evidence, we find the evidence of PW2 credible. The appellant was rightly convicted on Count II.
21. In the result we find that the prosecution's case in the trial court was proved. We dismiss the appeal and uphold both the conviction and sentence.

**Judgment dated and delivered at Nairobi this 19th day of March, 2013.**

…… ……

**R. LAGAT-KORIR** **D.K. NJAGI MARETE**

**JUDGE** **JUDGE**

In the presence of:

……..: Court clerk

……: Appellant

……: For the appellant

……..: For the State/respondent