REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 161 OF 2000

(Lesiit, Makau JJ)

(Being an appeal from the Judgment and sentence by CM's Court at Meru by Hon. D. K. Gichuki SRM in Criminal

Case No. 694 of 2009 delivered on 17th May, 2001)

GODFREY MWITI.....1ST APPELLANT

DAVID KINYUA.....2ND APPELLANT

ADAMS MUCHUI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was convicted of one count of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to suffer death as by law prescribed.

2. The Appellant had been convicted and sentenced with two others. They all appealed to the first appellate court and their appeals heard by Hon. Juma, J. and Tuiyot, J. However, the judgment delivered by the two Judge bench was never found. All three appealed to the Court of Appeal. In their judgment of 6th November, 2013 Musinga, Murgor and Otieno-Odek JJ.A. Ordered a retrial of their appeals by this court. Unfortunately by the time the Court of Appeal heard the appeals by the Appellant and his Co-Appellants, the Co-Appellants had passed on.

3. The Appellant's appeal was argued by Mrs. Jacinta Ntarangwi advocate. The learned counsel relied on the six grounds of appeal filed by the Appellant dated 28th May, 2001. The grounds can be summarized as follows:

i. **The evidence for identification was not supported by the initial report to the police.**

ii. **The vital evidence of the Investigating Officer was not adduced.**

iii. **The evidence by the prosecution did not receive corroboration and consequently.**

iv. **The prosecution case was not proved beyond reasonable doubt.**

v. **The prosecution case was full of contradiction; and**

vi. **The judgment of the learned trial magistrate lacked cogent reasoning as the law requires.**

4. Mrs. Ntaragwi in her submissions urged that the complainant did not identify anyone as he went to the scene after the event. By complainant, counsel was referring to PW1. Counsel urged that the identification witnesses were PW2 and 4 who referred to the Appellant as **"Muthaura**", yet his names were given as David Kinyua. Counsel raised doubts whether PW4 in particular who said she had been to school with the Appellant really knew him as she alleged.

5. In regard to PW3, who was PW1's watchman, Mrs. Ntaragwi urged the court to note he only met with the 3rd accused in the case. Counsel urged that there was a lapse of time which remained unexplained between date of the offence, 24th October, 1999; and the date of arrest, January 2000. Counsel relied on **Joseph Ngumbai Nzaro Vs Republic [1991]2 KAR 212.** We will refer to it latter.

6. Miss Muriithi, learned Prosecution Counsel represented the State in this appeal. She opposed the appeal. Miss Muriithi urged that the evidence of recognition by PW2 was reliable as he was armed with a lamp with which he was able to see and identify his assailants. Learned Prosecution counsel urged the court to disregard mistake of the Appellant's name by the prosecuting witnesses urging that identification was by physical appearance not by name. She urged that the commission of the offence took some time and ruled out mistake in identity of the Appellant.

7. In regard to PW4 learned prosecution counsel submitted that there could not have been a mistake in the identification of the Appellant. Counsel urged the court to dismiss the appeal.

8. We are a first appellate court and as required of us we have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses. We have given due allowance for that short coming. We have been guided by the case of **Okeno Vrs. Republic** 1972 EA 32 which set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (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 finding and conclusion; 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. See Peters Vrs Sunday Post [1958] E.A 424."**

9. There were two counts of offences facing the Appellant and his co-accused; the first one of robbery with violence contrary to section 296(2) of the Penal Code and in which PW2 was the complainant. The second count was shop breaking and committing a felony contrary to section 306 (a) of the Penal code and in which the complainant was PW1. The Appellant and his co-accused were convicted in count 1 and acquitted in count 2.

10. In respect of count 1 the complainant PW2 and his wife PW4 were asleep in their house when they heard a bang on their door. Two people entered their bedroom and demanded for money. PW2 gave 1000/-. Four other people entered also demanding money as the first two assaulted PW2. Eventually the 2nd accused in the trial before the lower court got 4,000/- in a carton under the complainant's bed and took it.

11. The Appellant was described as the 2nd accused in the case and both PW1 and 4 said that his name was Muthaura. They gave the role he played in the robbery as one who entered in the group of four people, after the initial two people. The two witnesses stated that the Appellant was the one who got 4,000/- from a cartoon under the bed and took it.

12. The Appellant was identified at night, the offence having taken place at 3 am or so. The conditions of light prevailing at the scene are described by PW2 and 4. PW2 said he had a lantern lamp which was on and which was placed at a table in the single room. There was torch lights from the torches the six assailants had. PW4 in addition to the lantern lamp and torch lights from the assailants also stated that when the door gave way and was flung open, light flooded into the room from the moonlight outside.

13. We cannot emphasize enough the importance of carefully and cautiously testing the evidence of identification, even where the witnesses claim they have known the assailant before the attack. The case in point on the great need of the court warning itself of the inherent dangers of usual identification is the one cited by Mrs. Ntarangwi **Nzaro v. Republic,** supra, where court held.

> 1. **Before accepting visual identification as a basis of a conviction, the court had a duty to warn itself of the inherent dangers of such evidence**.
>
> 2. **A careful direction regarding the conditions prevailing at the time of the identification and the length of time or which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential.**

14. The learned trial magistrate in his Judgment observed and found as follows:

> **I find that the main points of determination in this case is whether the accused were positively identified as the persons who robbed Riungu (PW2) on the material date...PW2 said there was light when the robbers struck. He could see the weapons they had and he could see the people clearly. He further said that the robbers were also having torches. The torches were lit and the torches provided sufficient light in the entire room for any person to see anything and anybody.**

15. Regarding evidence of light by PW4 the learned trial magistrate observed:

> "**The wife to Riungu PW4 on her part and in her evidence in court also said there was light from a canteen(sic) lamp there was light from the torches the robbers were using to light the house from one part to the other. I find the identification herein of the three accused by the watchman, Dominic (PW2) and his wife Lilian (PW4) is firm and positive. It was aided by the light from a canteen(sic) lamp)**

16. Clearly the learned trial magistrate was impressed by the nature and conditions of light in the room where robbery against PW2 took place. The light which seems to impress the learned trial magistrate is the torch light from the torches the assailants were carrying, and the lamp on a table in PW2's bedroom.

17. In order to test the evidence of identification made at night it is important that the light enabling identification is properly described. There must be evidence to indicate the position of the light vis a vis the person(s) identified and the distance of the light both from the identifying witness and the person(s) identified. The conditions of the light in terms of the strength of the light should also be given.

18. In **CHARLES O MAITANYI VS REPUBLIC(1985) 2 KAR 75** the court of Appeal held:

> **"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight.**

It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test are known because they were not inquired into. In days gone by, there could have been a careful inquiry into these matters by the committing Magistrates, State Counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care the evidence of a single witness?"

19. The room where the offence was committed is described as a single room. The actual size of the room is not given. This is important as the identifying witnesses said there were six robbers who entered their room. There was a bed in which both PW2 and 4 were seated. There is no description of how the six men were positioned in the room except the two who entered first and who were said to have hit the complainant in turns using a hammer and iron bar. It was also clear that some of the men were obscured from view, for instance the person who cut PW2 on the hand was described by PW2 and 4 as someone who stood behind the 3rd accused in the case.

20. We are not satisfied with the evidence of identification for the reasons the space inside PW2's bedroom where the offence was committed is not given, yet it is clear six men entered. The positions of the six men inside the room vis a vis the lantern lamp and torch lights was not described. There is no clear evidence to rule out possibility of the vision of PW2 and 4 being obscured due to the big numbers of the robbers, shadows created by light on objects and overcrowding in the room.

21. There is also inconsistency in the evidence of PW2 and 4 in regard to the manner in which the Appellant was armed. While insisting they saw clearly the persons who attacked them and how each was armed PW2 testified that the Appellant was armed with a panga and torch; while PW4 testified that the Appellant had a club and torch. It is not possible to confuse a panga and a club.

22. PW2 and 4 gave Appellant's name as Muthaura. Yet that name is not ascribed to the Appellant in the charge sheet. That is a discrepancy in their description of the Appellant which needed to be addressed both in evidence and in the trial court's judgment. That discrepancy was not considered.

23. PW3 was employed by PW1 as his watchman. PW3 said he saw and recognized the Appellant when he came out of the rear door to PW1's shop. PW3 said he came face to face with the 1st accused in the case and the Appellant and that he lit their faces with his torch.

24. This evidence of identification was given at the end of the evidence in chief and smacks of being an afterthought on PW3's part.

25. What concerns us however is the fact PW3 had a fleeting glance at the two people he met as he left the shop through the rear road. He said he ran away from them as they chased him in hot pursuit. He could not have had a proper view of the two and for that reason his evidence needed corroboration of other material evidence implicating the Appellant to sustain a conviction.

26. We find that the conditions of lighting under which PW2, 3 and 4 allegedly saw the Appellant was poor in quality, and was not described sufficiently to rule out the possibility of error or mistake. There is a possibility the witnesses were sincere, and their demeanor impressive as the learned trial magistrate found. Yet they may have been sincere but sincerely mistaken. Their evidence of identification, even though of recognition since they claim to have known the Appellant before, is not safe to found a conviction for the above reason.

27. We have come to the conclusion that the evidence of recognition given by PW2, 3 and 4 against the Appellant was not free from error or mistake. We also find that the discrepancy in the name Muthaura which PW2, 3 and 4 ascribed to the Appellant was material and was not resolved by the learned trial magistrate. The Appellant is not described anywhere in the charge by that name. For this and other reasons we have given in this judgment we find that the conviction entered against the Appellant was

unsafe and ought not to be allowed to stand.

28. Accordingly we find merit in this appeal and allow it. Consequently we quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully withheld.

DATED AT MERU THIS 18TH DAY OF JUNE 2014

J. LESIIT **J. A. MAKAU**

JUDGE. **JUDGE**