REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 46 OF 2010

(Lesiit, Makau JJ)

(Being an appeal from the original conviction and

sentence by Hon. K. W. Kiarie SPM in Criminal

Case No. 1343 of 2009)

JOSHUA MURIUKI MUGATHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMNT

1. The Appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were:

> "**On the 22nd July 2009 at Gitimbine Area in Meru Cenral District within Eastern Province jointly with others not before court robbed Zuena Wanja cash Ksh.100,000/- and VCD Player make L.G. valued at Ksh. 6,000/- and immediately after such robbery wounded the said Zuena Wanja"**

2. After trial, the Appellant was convicted of the offence charged and sentenced to death.

3. Being aggrieved by the conviction and sentence the Appellant filed this appeal. He relied on seven grounds of appeal namely:

> **(a) That the learned trial magistrate erred in law and facts in failing to observe that circumstances prevailed during the attack couldn't warrant a positive identification.**
>
> **(b) That the learned trial magistrate erred in law and facts in failing to note**

that the presentation of the exhibits fell short of the required standard.

(c) That the learned trial magistrate erred in law and facts in failing to find that the prosecution failed to summon vital witnesses mentioned in the trial case for a just decision to be reached.

(d) That the learned trial magistrate erred in law and facts in failing to observe that the prosecution gave contradictory and conflicting testimonies.

(e) That the learned trial magistrate erred in law and facts in dismissing and disregarding the sworn evidence without giving any cogent reasons for the same.

4. When the appeal came up for hearing, the Appellant relied on Supplementary grounds of appeal he filed and which were in the form of submissions. We shall analyze them as we consider this appeal.

5. Ms Muriithi, learned Prosecution Counsel represented the State in this appeal. Counsel opposed the appeal on grounds the Appellant was recognized during the robbery by the complainant who knew him before the incident as one, Maasai.

6. We have carefully considered this appeal and have subjected the evidence adduced before the trial court to a fresh analysis and evaluation and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance for same.

7. We are guided by the court of appeal decision of **Okeno Vs. Republic 1972 EA 32**. It was stated in that case 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."**

8. The brief facts of the case were that the complainant was asleep in her house when three men knocked at her door. It was about midnight. She opened for them when they threatened to break the door. The three men entered her house and took cash Ksh.10,000/- and a VCD Player from a drawer. They also placed a machete on her neck and hit her on the chest. They then left her house. Outside the three ran into PW2 who was on his way to answer PW1's screams. He was cut on the hand.

9. PW1 said she was able to see and recognize the Appellant as the one who placed the machete on her neck. She knew him before for a year as a friend of her neighbour one Kathure, whom he visited often. PW1 said that the Appellant was dressed in a jungle jacket and a woolen head gear. PW2 on his part said that the Appellant had a machete and wore a jungle jacket and that he saw him by security lights nearby.

10. The Appellant put forward an alibi as his defence. He said he was in Naro-Moru on the night of the alleged offence. He said he ran to the Police Station the day after the incident because PW3 and others chased him.

11. The Appellant was found guilty of the offence on the basis of the evidence of recognition given by the complainant and the supporting evidence of PW2. The learned trial magistrate found:

> "**The complainant herein said that at all material time a hurricane lamp was burning in her house and that it was the accused who placed a machete on her neck. She said she recognized him as Maasai Kathure's boyfriend. In my opinion the recognition by the complainant was positive and was in no way impeded by anything. Ishmail Muthomi (PW2) testified that when the accused and his companions met him the area was lit by security lights from nearby shops. Since this witness did not suspect the accused in any way the circumstances for recognition were favourable.**"

12. The evidence of PW1 and 2 is not related in that both were testifying of different circumstances and events. PW2 was not present at the time and place where PW1 was robbed.Each witness was therefore testifying of different events.

13. It is trite law that a fact can be proved by the evidence of a single witness so long as the evidence is tested and found to be strong enough to establish that fact. In this case we have the complainant testifying of a robbery committed against her at night. The complainant's evidence of recognition must be received with caution being the evidence of a single identifying witness made at night. In the celebrated case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, it was held:

> "**Subject to certain well known exceptions it is trite law that a fact may be proved by a 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 possibility of error.**"

14. The way to test the evidence of identification made at night was succinctly discussed in the case of **CHARLES O MAITANYI VS REPUBLIC (1985) 2 KAR 75** and has been approved in the Court of Appeal in many other cases. In the above case the court 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 helping to test if none of these matters 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?"**

15. PW1 said that she was able to see and recognized one of the three people who robbed her by the light of a lamp which was on a table in her bedroom. The size of the bedroom was not given. More important however, is the strength of the light and the distance the complainant and the assailant were from that light. No distances were given. We are unable to know how far the complainant was from the light. We are unable to know how far the assailant was from both the complainant and the source of light; and the angle at which the complainant saw the assailant.

16. Without a clear knowledge of the strength of the light and the distance at which the assailant was seen by the complainant, no one can say with certainty whether the identification was positive and without the possibility of error or mistake. What was required was other evidence implicating the Appellant with this offence.

17. The question is whether there was such other evidence. The prosecution offered PW2. PW2 did not witness the robbery. There is no clear evidence of how far the complainant's house was from the place PW2 met or allegedly met the Appellant. The witness' own evidence was:

> "**I heard some alarm being raised. I went to find out what was the matter.I was walking.I met with Maasai. He was coming from the direction the alarm was coming from.**

18. PW2 did not say at what place he was when he heard the alarm. PW2 does not disclose at what place he was walking when he met the Appellant. He does not describe the direction of the alarm. The evidence of PW2 was very vague and no attempt was made to relate that evidence to the complainant or complainant's house. The time of attack according to PW1 was around midnight. PW 2 said the incident he described happened at 12.30 am. There is therefore not much to create a nexus between the incident described by PW1 to that described by PW2. We are unable to find that the alarm PW2 heard was raised by PW1. This is because in PW1's entire evidence nowhere does she claim that she raised any alarm at any time of the alleged robbery.

19. We considered the circumstances under which PW2 said he saw and recognized the Appellant. He said he was able to see the Appellant by security lights from nearby shops. No attempt was made to disclose the location of the shops in relation to the Appellant. We are unable to say what was meant by "**nearby shops**" as no distances were given. Without the evidence of the distances at which PW2 allegedly saw the Appellant and the strength of the security lights and their distances from the person identified we are unable to tell whether the conditions of light were good for positive identification of the assailant.

20. We must mention here that the prosecution case was flawed for several reasons. First of all the particulars of the offence did not allege that the Appellant and his company were armed at all during the robbery. The evidence of PW1 and 2 that they were armed with machetes was therefore not supported by the particulars of the charge. Secondly it is alleged in the charge that the complainant was wounded. The P3 form produced by the doctor, PW 4 shows that the complainant suffered "**harm**" due to blunt object injuries. The "**harm**" was described as tendencies to the chest wall. In his evidence PW 4 did not say that the complainant was wounded. We think that the prosecution should have stuck to the injuries found on the complainant, which were assault. By choosing to use the word **"wound**" the prosecution was exaggerating the injuries suffered by the complainant.

21. There was evidence that the complainant reported this case on the 24th July, 2009. The Appellant surrendered to the police on 23rd, the day before the report. The Report of the incident to the police appears to us to have been an afterthought on the complainant's part. That does not augur well to the prosecution case as it gives the impression that the case against the Appellant was "**created**" or "**fished out"** after his arrest at the Police Station. According to the Appellant he presented himself to the Police for his safety as a result of a different incident in which PW3 and others implicated him with stealing from them and where they started attacking him.

22. PW3's evidence was that after hearing an alarm he and others went out to investigate. That is when they met PW2 who told them that the Appellant had assaulted him. PW3 said they started looking for the Appellant. First they found him and he ran to the police. That was on 23rd July. After the Appellant went to the Police they gave police a knife he threw away after threatening them with it. It was not produced in court as an exhibit.

23. Second PW3 and others went to the Appellant's house where they recovered a jungle jacket Exhibit 1, an explosive device Exh.4, a hat not produced as exhibit and photos Exh.5. PW3 said that after the arrest

of the Appellant and the recovery of the exhibits is when he learnt that the complainant had been robbed.

24. We bring in the evidence of PW3 to show that he too did not say that the alarm he heard on the material night was made by the complainant. In fact the complainant, PW1, was not in the picture as far as PW3 was concerned until after the Appellant was apprehended and exhibits recovered. PW3's evidence does not add value to PW1's evidence in any way.

25. The other fact is that the Prosecution should have treated PW2 as a complainant for the offence of assault. PW3 corroborates PW2's evidence that he was assaulted that night and he implicated the Appellant for the offence. In fact PW3 played the role of a Good Samaritan by taking PW2 to the Police and later to the hospital and eventually by helping to apprehend the Appellant for assaulting PW2.

26. The prosecution did not however take into consideration PW2's report of assault neither was he given a P3 form and finally they did not charge the Appellant for PW2's complaint against him.

27. The other fact which comes out very clearly is that the police did not investigate this case. The investigations were done for them by civilians led by PW3. There is no evidence to enable us understand the reason for the apparent apathy with which the police treated this case with. However, it is clear that they were not interested in investigating this serious case.

28. Having carefully considered this appeal we have come to the conclusion that the evidence of identification by PW1 was made in poor lighting conditions and therefore which needed to be corroborated by material evidence implicating the Appellant with the evidence. The evidence of PW2 was also based on identification under unclear conditions and itself needed corroboration.

29. It is trite law that evidence needing corroboration cannot be used to corroborate other evidence also needing corroboration. No other evidence implicating the Appellant was adduced. The evidence against the Appellant therefore weak and unsafe to found a conviction. The conviction entered against the Appellant was therefore unsafe and cannot be allowed to stand. We therefore find merit in this appeal and accordingly we allow the same quash the conviction and set aside the sentence.

30. The Appellant should set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED THIS 18TH DAY OF JUNE, 2014.

J. LESIIT **J.A.MAKAUA**

JUDGE. **JUDGE**